84-188

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (EPAA), as originally enacted and as amended by the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (EPCA), established a system of price controls which governed the sale of crude oil and other petroleum products. The statutory scheme authorized the President to take action to lift controls or raise prices but permitted either House of Congress to veto such presidential action by a simple majority vote. The House of Representatives twice vetoed presidential decontrol orders. The court of appeals below held that the constitutional ruling in *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983), should not be applied retroactively to statutes enacted, regulations promulgated or legislative vetoes exercised prior to the *Chadha* decision. In the alternative, the court held that the veto provisions are severable and that the regulations promulgated under the acts are enforceable despite the impact on them of the threatened and actual use of the congressional veto power. The questions presented are:

1. Whether the constitutional ruling in *Chadha* has retroactive effect and therefore can be applied to the EPAA and the EPCA.

2. Whether the legislative veto provisions of the EPAA and the EPCA can properly be held severable merely on the ground that "Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all."

3. Whether price control regulations whose substance and duration were materially influenced by the presence and use of the legislative veto may constitutionally be enforced.

4. Whether effect should be given to the presidential decontrol orders vetoed by Congress.

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b). A list of the parent companies, subsidiaries and affiliates (except wholly owned) of the corporate petitioners, as required by Supreme Court Rule 28.1, is set forth in Appendix J.

Plaintiffs (Petitioners here):

Energy Reserves Group, Inc.
Suburban Propane Gas Corporation
Marathon Petroleum Co. (formerly Marathon Oil Co.)
Sklar & Phillips Oil Company
Sierra Petroleum Co., Inc.
Braden-Zenith, Inc.
Mobil Oil Corporation
Mobil Producing Texas & New Mexico, Inc.
Mobil Oil Exploration & Producing Southeast, Inc.
Willie Ansley Bryson
Stelbar Oil Corporation, Inc.
The Standard Oil Company, an Ohio Corporation
Theo M. Glenn, Jr.
Eleanor E. Glenn
Robert Dale Brandenburg
Texaco Inc., a Delaware Corporation
Aminoil Inc. (formerly Aminoil USA, Inc.)
Conoco Inc. (formerly Continental Oil Co., Inc.)
Sun Exploration and Production Co.
Otis C. Peavey
Everal A. Peavey
Gladys G. Peavey
Ronald J. Peavey
Kenneth Wellbrock
Nora C. Binder
Fred J. Jorgensen
Arlene M. Wolfe

Dora J. Johnson
Robert F. Johnson
Marilyn J. Johnson
Howard Stout, Co-Trustee of the Charles S. Page Trust
Lorena Houlton, Co-Trustee of the Charles S. Page Trust
Mary E. Hall, Co-Trustee of the Charles S. Page Trust
Gulf Oil Corporation
Robert E. Davis
Energy Consumers and Producers Association, Inc. (formerly Oklahoma Association of Energy Consumers and Producers)
Ruthven, Inc.
Saline Supply Company, Inc. (formerly Pioneer Operations Company, Inc.)
George R. Jones
Rex Archer
T. B. Wilcox, III
Wico Oil Company
Jack Fena
James Tasheff
Robert G. Braden
National Cooperative Refinery Association
Estate of Martin Wunderlich
Estate of Charles F. Curry
Guy E. Stanley, Jr.
J. R. Dougherty
John B. Dougherty
Estate of Milton McGreevy
Herndon Drilling Company
Rhude & Fryberger, Inc.
Petroleum Management, Inc.
Atlantic Richfield Company
W. R. Murfin d/b/a Murfin Drilling Company
Champlin Petroleum Company
Exxon Corporation
Hunt Oil Company
Crystal Oil Company
Ira Thomas May

Muskegon Development Company
Paul B. Fletcher, Sr.
Anadarko Production Company
IU International Oil & Gas, Inc.
Wood Oil Co.
Dan Wallace d/b/a Columbus Oil Co.
Will I. Lewis Enterprises, Inc.
Jimmie Austin d/b/a Austin Drilling Company
Santa Fe Energy Company
George G. Anderman
Donald R. Kirby
Patricia Anne Leonard
Mary Kay Harrington
A. F. McMillan
Zula McMillan
Farmers Crude Production Co. (formerly Farmers Petroleum Cooperative, Inc.)
William C. Kirkwood d/b/a Kirkwood Oil and Gas Company
Petroleum Corporation of Texas

Defendants (Respondents here):

United States Department of Energy
Donald P. Hodel, Secretary of Energy

Intervenors:

Total Petroleum, Inc.
Tenneco Oil Company
Pennzoil Company
Tosco Corporation
Ashland Oil, Inc.
Texas City Refining, Inc.
American Independent Refiners Association (formerly American Petroleum Refiners Association)
Chevron U.S.A., Inc.
Farmland Industries, Inc.
Shell Oil Company
The State of Michigan

The State of Alabama
The State of California
The State of Arkansas
The State of Kansas
The State of Delaware
The State of Iowa
The State of North Dakota
The State of Rhode Island
The State of Texas
The Commonwealth of Virginia
The State of West Virginia
The State of Mississippi
The State of Montana
The State of Minnesota
The State of Colorado
The Commonwealth of Pennsylvania
The State of Georgia
The State of South Carolina
The State of Vermont
The State of Nebraska
The State of North Carolina
The State of Illinois
The State of Ohio
The State of South Dakota
The State of Wisconsin
The State of Oregon
The State of Maryland
The State of New Jersey
The State of Tennessee
The State of Nevada
The State of Hawaii
The State of New Mexico
The Commonwealth of Puerto Rico
The Territory of Guam
The U.S. Virgin Islands
The District of Columbia
The State of New York
The Commonwealth of Massachusetts

The State of Connecticut
The State of New Hampshire
The State of Maine
The State of Louisiana
The State of Utah
The State of Idaho
The State of Indiana
The State of Wyoming
National Freight, Inc.
Philadelphia Electric Co.
Payne 22, Inc.
Anthony Monaco
Rex Shipley
Robert Sharo
George Theodore
Harvey Hatfield
Richard Vielhaber
Nicholas Peto
National Oil Jobbers Council
Geraldine H. Sweeney
RJB Cab, Inc.
Air Transport Association of America
Virginia Electric and Power Company
The Jobbers' Group

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ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Energy Reserves Group, Inc., *et al.*, hereby petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States in these cases.[1]

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States (TECA) is as yet unreported and appears in Appendix (App.) A.[2] The opinion and order of the United States District Court for the

---

[1] The opinion below disposed of two consolidated cases, *Exxon Corp. v. United States Department of Energy*, No. 5-103, and *In re Department of Energy Stripper Well Exemption Litigation*, No. 10-51.

[2] Appendix A is attached to this petition. Appendices B through J are separately bound.

Northern District of Texas in *Dorchester Gas Producing Co. v. United States Department of Energy*, certifying the constitutional question to TECA,[3] is reported at 4 Energy Mgmt. (CCH) ¶ 26,464 (N.D. Tex. Dec. 21, 1983), and appears at App. B. (The opinion but not the order is also reported at 582 F. Supp. 927.) The opinion of the United States District Court for the District of Kansas in *In re Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D. Kan. Jan. 25, 1984), also certifying constitutional questions, is reported at 578 F. Supp. 586, and appears at App. C.[4]

JURISDICTION

TECA's judgment was entered on July 6, 1984. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. § 1904 note (1976)), App. G, pp. 136a-40a, as incorporated by

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[3] The district courts have no power to decide "substantial constitutional issues" in actions commenced under the EPAA and EPCA. Pursuant to § 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1976), incorporated by § 5(a)(1) of the EPAA, Pub. L. No. 93-159, 87 Stat. 627, 633, such issues must be certified to TECA.

[4] Only the constitutional issues arising from *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983), were before the court below and are sought to be reviewed here. Several previous opinions in these cases dealt with nonconstitutional issues. *See Energy Reserves Group, Inc. v. Federal Energy Admin.*, 447 F. Supp. 1135 (D. Kan.), *rev'd sub nom. Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (TECA 1978), *mandamus denied*, 613 F.2d 305 (TECA 1979), *on remand, In re Dep't of Energy Stripper Well Exemption Litig.*, 520 F. Supp. 1232 (D. Kan. 1981), *rev'd*, 690 F.2d 1375 (TECA 1982), *cert. denied*, 459 U.S. 1127 (1983); *Dorchester Gas Producing Co. v. United States Dep't of Energy*, 582 F. Supp. 911 (N.D. Tex. 1983).

section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633, App. G, p. 152a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 1 and Section 7, clauses 2 and 3, and the Fifth Amendment are reprinted at App. F. The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, and extensions thereof are reprinted at App. G, pp. 141a-59a. The Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, Title IV and Title V, Part C, are reprinted at App. G, pp. 160a-200a.

STATEMENT

This is the first case to present this Court with a full range of issues regarding the scope and application of *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). Both of the statutes under which this case arises, the Emergency Petroleum Allocation Act (EPAA) and the Energy Policy and Conservation Act (EPCA), contain legislative veto provisions. TECA's ruling against retroactive application of *Chadha* threatens to emasculate that decision and thus by itself merits review by this Court. The decision below also applies an erroneous test for determining the severability of unconstitutional statutory provisions and raises fundamental questions regarding the application of the principle of *Chadha* in circumstances where the impending threat and actual use of the legislative veto shaped a regulatory scheme. Finally, TECA refused to enforce regulations that were vetoed by Congress, thereby sustaining the actual exercise of an unconstitutional legislative veto.

A. Background Of These Consolidated Cases.

The decision below was entered in two consolidated cases, one originating in the District of Kansas (the

"stripper well" case) and one originating in the Northern District of Texas (the "NGL" case). These two cases began as separate challenges by producers and refiners to different portions of the price control regulations promulgated under the EPAA and the EPCA. In the court below, however, the two cases presented common constitutional questions following in the wake of *Chadha* and therefore were heard on a consolidated basis.

1. *The stripper well case.* Price control regulations under the EPAA, as originally enacted and as amended by the EPCA, were in effect from December 27, 1973, to January 28, 1981. During most of this time, crude oil produced from so-called stripper well properties (defined as properties with average daily production of not more than 10 barrels per well per day) was exempt by statute from price controls.[5] The plaintiffs in the stripper well case initially sought declarations that injection wells[6] were to be taken into account in determining stripper well status.

The district court entered preliminary injunctions which allowed the plaintiffs to sell the crude oil in question at market prices but required them to place into escrow the difference between the price received and the maximum lawful price that could have been charged if the crude oil were subject to controls. (An exemplar injunction appears at App. D.) The escrow accounts so established now contain in excess of $800 million. In

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[5] EPAA § 4(e)(2)(A). EPCA § 401(a) (adding EPAA § 9(b)(1)) repealed the stripper well exemption, and all stripper production was briefly subjected to price controls. *See* 41 Fed. Reg. 4931 (1976). However, Congress reinstated the stripper well exemption in the Energy Conservation and Production Act, § 121, Pub. L. No. 94-385, 90 Stat. 1125, 1132-33 (1976).

[6] "Injection wells" are wells through which water or other matter is injected into a crude oil reservoir to maintain the pressure required to drive oil to the well bore through which oil is extracted from the reservoir.

In re Department of Energy Stripper Well Exemption Litigation, 690 F.2d 1375 (TECA 1982), *cert. denied*, 459 U.S. 1127 (1983), TECA upheld the position of the Department of Energy (DOE) that injection wells are to be disregarded in determining stripper well status. The district court is now considering the proper disposition of the escrow accounts and other enforcement issues. *See* App. C, pp. 83a-85a.

Following this Court's decision in *Chadha*, the plaintiffs moved to certify to TECA certain constitutional questions arising from the one-house veto provisions contained in the EPAA and the EPCA, and that motion was granted by order of January 25, 1984. App. C, pp. 85a-93a.

2. *The NGL case.* The plaintiffs in the NGL case challenged the interpretation and validity of regulations issued under the EPAA and the EPCA governing natural gas liquids (NGLs).[7] In an opinion dated November 23, 1983, the district court granted the plaintiffs' motion for summary judgment on one issue and granted DOE's motion for summary judgment on three other issues. App. B, pp. 41a-56a. At the same time, the court certified the case to TECA for consideration of the constitutional issue raised by *Chadha*. *Id.*, pp. 56a-59a.

B. The Challenged Statutory Provisions.

The EPAA, as originally enacted and as amended by Title IV of the EPCA, constitutes an integral statutory scheme requiring the President to promulgate price controls but authorizing the President to act to lift controls or raise prices subject to the right of either House of Congress to veto such presidential action by a simple majority resolution. Through threatened and actual exercise of this legislative veto, Congress hamstrung the President's delegated authority to decontrol crude oil and

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[7] NGLs are liquids composed of ethane, propane, butane, and natural gasoline that may be recovered by processing natural gas.

refined petroleum products and to establish prices at levels he believed to be warranted.

1. *The EPAA.* The EPAA was enacted in November, 1973, during a period of crude oil and petroleum product shortages. Pub. L. No. 93-159, 87 Stat. 627. App. G, pp. 141a-55a. Section 4(a) of the EPAA required the President to promulgate regulations "for the mandatory allocation of crude oil . . . at prices specified in (or determined in a manner prescribed by) such regulation." The statute was enacted as temporary emergency authority, to expire not later than February 28, 1975. EPAA § 4(g)(1). The EPAA was then extended three times for six months or less. *See* Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975). App. G, pp. 156a-59a.

While mandating temporary imposition of price controls, the EPAA required the President to preserve "an economically sound and competitive petroleum industry," to provide for "economic efficiency," and to minimize "economic distortion, inflexibility, and unnecessary interference with market mechanisms." EPAA § 4(b)(1)(D), (H), (I). To permit these ends to be achieved, section 4(g)(2) authorized the President "at any time" to exempt crude oil or refined petroleum products from the price controls for up to 90 days at a time.

Presidential decontrol orders were, however, subject to a provision for one-house legislative veto. The President was required to submit any decontrol order to Congress at least five legislative days prior to its proposed effective date; either House could veto such an order by majority vote. EPAA § 4(g)(2). The EPAA did not include a severability provision.

Beginning in 1975, President Ford developed plans to exercise this decontrol authority. He submitted two major decontrol orders to Congress in July 1975. Both were

vetoed by majority vote in the House. 121 Cong. Rec. 23,983-84 (1975); *id.* at 25,881-82. (These vetoes are discussed at p. 26 *infra.*)

2. *The EPCA.* The EPCA was enacted in December 1975. Pub. L. No. 94-163, 89 Stat. 871. App. G, pp. 160a-200a. Section 401 of the Act amended the EPAA by adding a new section 8 entitled "Oil Pricing Policy." Section 8(a) required the President to amend the existing price regulations so as to establish an "actual weighted average first sale price" for all crude oil produced in the United States of not more than $7.66 per barrel. EPCA § 401(a) (adding EPAA § 8(a)).

The President was also given authority to implement decontrol through price increases. However, section 401 subjected four aspects of the President's pricing authority to three distinct one-house veto provisions. The President was required to submit regulations for legislative review (1) if he sought to create production incentives by authorizing increases in the composite price in excess of three percent per year, EPCA § 401(a) (adding EPAA § 8(e)(1)(A)); (2) if he sought to allow combined production incentives and inflation adjustments in excess of ten percent per year, *id.* (adding EPAA § 8(e)(1)(B)); (3) if he sought to allow any price increases for production incentives past a certain date in 1977, *id.* (adding EPAA § 8(f)); or (4) if he sought to allow higher prices to create production incentives outside of Alaska, *id.* (adding EPAA § 8(g)).[8] The EPAA § 4(g) authority to decontrol crude oil and petroleum products altogether was replaced by EPCA § 455 (adding EPAA § 12), which authorized the President to decontrol refined

[8] The EPCA provisions relating to the 3% limitation on production incentives were repealed by § 122 of the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). However, a presidential order seeking to exceed the combined 10% limitation on production incentives and inflation adjustments continued to be subject to legislative veto.

products, residual fuel oil, or crude oil after the first sale. As under former EPAA § 4(g), such decontrol orders were subject to one-house veto. Like the EPAA, the EPCA had no severability clause.

C. The Decision Below.

The court of appeals held that the constitutional ruling in *Chadha* may not be applied retroactively to the EPAA and the EPCA. App. A, pp. 30a-35a. The court further concluded that the legislative veto provisions of the EPAA and the EPCA are severable from the remainder of those statutes, App. A, p. 36a, explictly adopting the standard employed in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (TECA), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-20),[9] which had stated the test for severability to be "whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." App. E, p. 109a. The court refused to invalidate regulations whose substance and duration had been influenced by actual and threatened exercise of legislative vetoes. App. A, pp. 37a-39a. The court also refused to enforce the decontrol orders that had been vetoed by the House. *Id.*, p. 39a.

REASONS FOR GRANTING THE WRIT

This Court's invalidation of the legislative veto in *Chadha* was a constitutional decision of wide public importance. In the wake of that decision, a number of important questions remain to be resolved. The present case demonstrates the necessity for the Court to act to prevent erosion of the *Chadha* ruling and to give authoritative guidance to the lower courts on these remaining questions.

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[9] The petition for certiorari in *Dyke* does not involve the question of severability or any other issue related to *Chadha*.

In this case, the legislative history shows that the one-house veto provisions in both the EPAA and the EPCA were integral to the statutory scheme. It is evident, moreover, that the presence of the unconstitutional veto power was a palpable force in shaping the price control regulations under those statutes. The veto was exercised to strike down two presidential decontrol orders, and the threat of further exercise was never far beneath the surface. The court below nonetheless declined to apply *Chadha* retroactively and, indeed, declined to give that decision any effect whatever.

The case thus poses several important post-*Chadha* issues that should be resolved by this Court: (1) retroactive vs. prospective only application; (2) the severability of one-house veto provisions that were of undoubted importance in the legislative compromises necessary to secure enactment; (3) the enforceability of regulations whose substance and duration were shaped by the existence and use of the unconstitutional veto power; and (4) the effect to be given presidential orders that were unconstitutionally vetoed. Because of the growing number of cases that present such issues,[10] there is a special need for this Court to exercise its power of supervision in order to promote consistency in the development of applicable legal standards.

Moreover, the decision below rejecting retroactive application of *Chadha* is in direct conflict with two summary affirmances by this Court in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983), and *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir.

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[10] *See, e.g., Alaska Airlines, Inc. v. Donovan*, No. 84-0485 (D.D.C. May 18, 1984), *appeals docketed*, Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984) (§ 43 of the Airline Deregulation Act); *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 52 U.S.L.W. 3889 (U.S. June 11, 1984) (No. 83-1021) (Reorganization Act of 1977); *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983) (Presidential Recordings and Materials Act).

1982), *aff'd*, 103 S. Ct. 3556 (1983). And the legal standard used by TECA in resolving the issue of severability is incompatible with that consistently employed by this Court. *See Chadha*, 103 S. Ct. at 2774; *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Review therefore also is warranted to ensure adherence by the lower courts to this Court's decisions. Finally, this is a case of great importance to the petroleum industry.

I. THE *CHADHA* RULING IS NOT LIMITED TO PROSPECTIVE EFFECT.

These actions challenge statutes and regulations that predate this Court's decision in *Chadha*, and the actions were commenced prior to *Chadha*. The question is thus presented whether the ruling in *Chadha* should be applied retroactively to those statutes and regulations. The court below, saying that this was "the primary issue to be decided," held that *Chadha* was not to be given any retroactive effect. App. A, p. 30a. The court therefore upheld actual exercises of the legislative veto and did not reinstate the vetoed presidential decontrol orders. Moreover, in the court's view, even if the one-house veto provisions of the EPAA and the EPCA were inseverable from the remainder of those statutes and even if Congress did demonstrably influence the regulations through the veto power, the statutes and the regulations promulgated thereunder could nonetheless continue to be enforced. These determinations conflict with decisions both of this Court and of other lower courts and are incorrect.

A. This Court Has Indicated That *Chadha* Is To Be Applied Retroactively.

In *Chadha*, this Court gave every indication that its ruling would have retroactive effect. The far-reaching consequences of the decision were well known to the Court, which noted that congressional veto provisions appear in a large number of statutes. 103 S. Ct. at 2781. A dissenting opinion called attention to nearly 200 statutes which contain legislative veto provisions, including

the EPCA. *Id.* at 2792, 2794-95, 2812 (White, J., dissenting). Concurring and dissenting opinions both observed that the apparent effect of the ruling was to invalidate all of these provisions. *Id.* at 2788 (Powell, J., concurring); *id.* at 2792, 2796, 2810-11 (White, J., dissenting). The opinion of the Court, while responding to the concurring and dissenting opinions in other respects, *id.* at 2781, 2787-88 nn. 21, 22, did not dispute this conclusion.

In these circumstances, it seems quite probable that the Court would have signaled a "prospective only" application if that was its purpose. Yet it gave no hint of such an intention. *Compare Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982), and *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (decisions explicitly stated to have only prospective effect).

Any doubt about this Court's intention should have been put to rest by its action, shortly after deciding *Chadha*, in summarily affirming two decisions striking down legislative veto provisions in two other statutes. *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983) (Federal Trade Commission Improvements Act of 1980); *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983) (Natural Gas Policy Act of 1978). Both cases involved statutes enacted prior to *Chadha* and agency action that predated *Chadha*. Those summary affirmances are authoritative pronouncements that bind the lower courts on the question of retroactivity. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975).

Taking their cue from this Court, several lower courts have applied *Chadha* retroactively to invalidate legislative veto provisions or actions under statutes containing such provisions. *See Alaska Airlines, Inc. v. Donovan*, No. 84-0485 (D.D.C. May 18, 1984), *appeals docketed*,

Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984); *EEOC v. Martin Industries, Inc.*, 581 F. Supp. 1029 (N.D. Ala.), *appeal docketed*, No. 83-1893 (U.S. May 18, 1984); *EEOC v. Westinghouse Electric Corp.*, 33 F.E.P. Cas. (BNA) 1232 (W.D. Pa. Jan. 5, 1984), *appeal docketed*, No. 83-1938 (U.S. May 25, 1984); *Allen v. Carmen*, 578 F. Supp. 951, 966-68 (D.D.C. 1983); *City of Alexandria v. United States*, 3 Cl. Ct. 667, 675-78 (Oct. 20, 1983), *rev'd on other grounds*, No. 84-713 (Fed. Cir. June 21, 1984); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224, 1232-33 (S.D. Miss 1983), *appeal dismissed*, 52 U.S.L.W. 3889 (U.S. June 11, 1984) (No. 83-1021) The only case declining to give *Chadha* retroactive effect, other than the decision below, is *EEOC v. Chrysler Corp.*, 33 F.E.P. Cas. (BNA) 1838, 1843-44 (E.D. Mich. Jan. 24, 1984).

Thus, TECA's holding in this case conflicts with the apparent intent of this Court in *Chadha*, with this Court's summary affirmances in *Consumers Union* and *Consumer Energy Council*, and with the predominant weight of lower court authority. The issue warrants review by this Court to ensure consistent application of the important constitutional ruling in *Chadha*. *Cf. EEOC v. Allstate Insurance Co.*, 52 U.S.L.W. at 3890 (Burger, C.J., dissenting from dismissal for want of jurisdiction).

B. Governing Principles Of Retroactivity Require Application Of *Chadha* Here.

Only in exceptional circumstances has this Court refused to give retroactive application to rulings in civil cases. When the Court has limited such rulings to prospective application, it has applied a three-part test that was summarized as follows in *Northern Pipeline*, 458 U.S. at 87-88:

> "Our decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first,

> whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases . . .; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question . . .; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases . . . ."

By its summary affirmances in *Consumers Union* and *Consumer Energy Council*, this Court evidently determined that these considerations do not bar retroactive application of the ruling in *Chadha*.

In any event, the three-part test articulated in *Northern Pipeline* does not justify declining to give *Chadha* retroactive application. First, the validity of the one-house veto was open to serious doubt long before the decision in *Chadha*. *See Allen v. Carmen*, 578 F. Supp. at 966 (*Chadha* "not the type of decision that constituted an entire break with the past or one that was not foreshadowed"); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. at 1233 ("definitely foreshadowed by prior events"). For decades, presidents had questioned the constitutionality of congressional vetoes. *See* 103 S. Ct. at 2779 n.13; *Consumer Energy Council*, 673 F.2d at 453-54. Furthermore, the legislative veto had been invalidated by courts of appeals in several prior actions.[11] Even the existence of conflicting decisions in the courts of appeals on an issue makes "review of that issue by this Court and decision against the position of the respondent reasonably foreseeable." *United States v. Rodgers*, 104 S. Ct. 1942, 1949 (1984). *See Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972) (decision resolving a conflict in the circuits does not estab-

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[11] *See American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982); *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980). Only in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), was a legislative veto sustained.

lish "a new principle of law" within the meaning of *Chevron*).[12]

As to the second factor, there is no respect in which retroactive application of the rule in *Chadha* could be said to retard its operation. Indeed, to permit continued enforcement of a statute unconstitutional under *Chadha*, and to give effect to the actual exercise of a legislative veto, would undermine the purpose of that decision. As this Court emphasized, "the carefully defined limits on the power of each Branch must not be eroded. . . . [W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." 103 S. Ct. at 2787, 2788. These restraints should not operate merely prospectively. *See EEOC v. Allstate Insurance Co.*, 570 F. Supp. at 1229 ("It is evident from the opinion in *Chadha* that 'every use of the legislative veto' is invalid," quoting Powell, J., concurring, 103 S. Ct. at 2788.).

In declining to apply *Chadha* retroactively, the court below relied primarily on its conclusion that retroactive application of *Chadha* "would produce substantive inequitable results." App. A, p. 35a. But the true inequity would be to permit continued enforcement of unconstitutional statutes and invalid legislative actions. These cases illustrate the problem in an acute form and dramatize the unfairness inherent in a failure to apply the ruling in *Chadha* to statutes enacted and vetoes exercised prior to the date of decision. In these and other cases, the government is attempting to impose liability of hundreds of millions of dollars on the basis of price control regulations that were promulgated under statutes that contravened the principle of *Chadha*—regulations, moreover, whose

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[12] In *Chevron*, the Court stressed that the decision which it determined to apply only prospectively had overruled a long line of contrary decisions. 404 U.S. at 107. *See United States v. Johnson*, 457 U.S. 537, 550-51 (1982).

substance and duration were shaped by congressional pressure exerted through threatened and actual exercise of the legislative veto. DOE succeeded for years in enforcing these regulations, to the vast detriment of the petroleum industry. Billions of dollars transferred from producers between 1973 and 1981 are now irretrievably lost. *See* J. Kalt, *The Economics and Politics of Oil Price Regulation* 187-235 (1981). It would be manifestly unjust to require the further transfer of additional hundreds of millions of dollars pursuant to unconstitutional statutes and invalid regulations.

The countervailing inequity perceived by TECA in this case is entirely illusory. Contrary to the court's suggestion, invalidation of the EPAA and the EPCA under *Chadha* would not disturb "a nearly infinite number of obligations incurred or performed in good faith, and enforced or enforceable in administrative and judicial proceedings." App. A, p. 35a. Such a determination would affect only pending proceedings and future actions that are timely brought. It would not revive or undo transactions which are subject to a bar of res judicata or statute of limitations. *E.g., Hill v. Stone*, 421 U.S. 289, 301-02 (1975); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). *See Zweibon v. Mitchell*, 606 F.2d 1172, 1177 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981).[18]

In short, this Court already has applied the ruling in *Chadha* retroactively, and consideration of the three-part

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[18] As stated by Justice Harlan:

"The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . [T]hat moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become res judicata." *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (concurring opinion).

test indicates that continued such application is proper. Indeed, if *Chadha* were not to be applied retroactively to statutes enacted or legislative vetoes exercised prior to the date of decision, it would lose much of its essential force and effect. TECA therefore clearly erred in refusing to apply that ruling to the statutes and actual legislative vetoes at issue here.

II. THE LEGISLATIVE VETO PROVISIONS ARE INSEVERABLE FROM THE REMAINING SECTIONS OF THE EPAA AND THE EPCA.

A. TECA Applied The Wrong Test For Severability.

A statute that incorporates unconstitutional provisions must fall in its entirety unless the invalid provisions are severable. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 834 (1973). The proper standard for determining severability has been firmly established by this Court: the entire statute falls if " 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Chadha*, 103 S. Ct. at 2774 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)).

With respect to the issue of severability, the opinion below rests upon *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-20). Though the *Dyke* opinion made passing reference to the proper standard, *id.* at 803, it departed from precedent by actually applying a completely different and erroneous test for severability: "[T]he question is . . . whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." *Id.* at 804.

The *Dyke* formulation seriously diverges from the proper test because it excludes consideration of one of the most likely possibilities, *i.e.*, that, had Congress known the legislative veto was invalid, it would have enacted a

different statute rather than no statute at all. The test reaffirmed in *Chadha* is not met merely because Congress would have enacted some form of alternative legislation in any event. "[T]he issue is whether Congress would have enacted the *same* statute." *Alaska Airlines, Inc. v. Donovan*, No. 84-0485, slip op. at 5 n.3 (D.D.C. May 18, 1984), *appeals docketed*, Nos. 84-5467 & 84-5468 (D.C. Cir. July 26, 1984) (court's emphasis). *See also Lemke v. Farmers Grain Co.*, 258 U.S. 50, 60 (1922); *Consumer Energy Council*, 673 F.2d at 442. The lower court's use of a severability test inconsistent with the test approved in *Chadha* warrants this Court's review.

B. Neither The EPAA Nor The EPCA Would Have Been Enacted In The Same Form Without The Legislative Veto Provisions.

Because it applied the wrong severability test, the court below reached the wrong result. The legislative history shows beyond doubt that Congress would not have enacted the same statutes independently of the one-house veto provisions. Under the proper test, therefore, those provisions are inseverable.

1. *The EPAA.* The legislative veto provision in the EPAA was an essential part of a carefully integrated scheme to resolve an impasse between a Congress desiring mandatory price and allocation controls and a President opposed to such controls.

In early 1973, over the opposition of congressional Republicans, Congress passed amendments to the Economic Stabilization Act of 1970 (ESA) authorizing, but not requiring, the President to allocate petroleum products. Pub. L. No. 93-28, 87 Stat. 27 (1973). On signing this bill into law, President Nixon emphasized his reservations concerning such controls, 1973 Pub. Papers of Pres. Nixon 340, and he declined to exercise the new authority. *See* 119 Cong. Rec. 16,710-11 (1973) (Sen. Jackson). Thereupon, additional legislation was proposed to require the President to impose allocation controls. S. Rep. No. 159, 93d Cong., 1st Sess. 6 (1973) (S. 1570); H.R. Rep.

No. 531, 93d Cong., 1st Sess. 10-12, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2587-89 (H.R. 9681). By October 1973, both Houses had passed such bills; the House bill also mandated price controls. Neither bill provided for presidential decontrol. *See* 119 Cong. Rec. 18,064-67 (1973) (S. 1570); *id.* at 34,477-79 (H.R. 9681).

When the Senate and House bills went to conference, the polar positions of the President and the Congress had to be reconciled. The majority in Congress believed that the national energy crisis required the prompt enactment of a statute mandating the imposition of controls. *See* 31 Cong. Q. 2826, 2785 (Oct. 20, 1973); 2960-62 (Nov. 10, 1973); 3007-09 (Nov. 17, 1973). At the same time, Congress recognized that the President's opposition to mandatory controls was strong and that he apparently was prepared to veto the bills as passed. *See* 31 Cong. Q. 1465 (June 9, 1973); 2825 (Oct. 20, 1973); 3020, 3057 (Nov. 17, 1973); 3275 (Dec. 15, 1973).[14] From the beginning, the President had sought decontrol authority, and he considered the absence of any "provision . . . for removing controls" to be a serious defect. 119 Cong. Rec. 18,054 (1973) (letter from William Simon, Deputy Secretary of the Treasury); *see also id.* at 34,312 (letter from John A. Love, Assistant to the President).

A stalemate was avoided only by adding in conference (1) decontrol provisions to satisfy the President and (2) legislative veto provisions to reassure Congress. The Democratic House manager of the EPAA and Chairman of the Conference Committee, Representative Staggers, described the addition of the decontrol authority and legislative veto provisions as among "the most significant

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[14] A successful presidential veto was a distinct possibility. Shortly after enactment of the EPAA, Congress passed a bill that would have rolled back domestic crude oil prices. 120 Cong. Rec. 3467, 4439 (1974). President Nixon vetoed the bill, 1974 Pub. Papers of Pres. Nixon 226, and the Senate sustained the veto. 120 Cong. Rec. 5534 (1974).

matters agreed to in conference," and he emphasized the congressional power to "override" presidential determinations. 119 Cong. Rec. 36,866 (1973).

The EPAA's decontrol provisions would not have been passed by Congress without the legislative veto provisions. Such a bill would have given the President unchecked discretion over the regulatory program and thus defeated the congressional purpose in mandating controls. At the same time, Congress concluded that it could not omit decontrol authority in view of the likelihood of a successful veto. In short, the integral scheme of price controls, decontrol authority, and legislative review was enacted as a whole to break a political stalemate. That scheme must stand or fall as a whole.[15]

2. *The EPCA.* The EPCA was a still more precisely calibrated political compromise, in which even greater attention was given to the role of the legislative veto. Between enactment of the EPAA in November 1973 and enactment of the EPCA in December 1975, the political struggle over energy policy intensified sharply.

President Ford wanted to free energy prices from controls in order to stimulate domestic production and encourage conservation. In February 1975, he proposed legislation pursuant to which price controls would have expired on June 30, 1975. H.R. Doc. No. 42, 94th Cong., 1st Sess. (1975). When this legislation was not acted upon, the FEA proposed, and then promulgated, regulations to phase out price controls on crude oil. The Democratic congressional majority, however, was steadfastly opposed. By threatened and actual use of legislative vetoes, the House blocked the President from decontrolling petroleum prices. *See* 121 Cong. Rec. 23,984 (1975);

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[15] The EPAA did not contain a severability clause, and this omission hardly seems to have been inadvertent. In enacting the EPAA, Congress had before it as a model the generally applicable Economic Stabilization Act of 1970. The EPAA incorporated a number of ESA provisions, but the ESA's severability clause (§ 220) was not included. EPAA § 5(a)(1).

id. at 25,881-82. In turn, President Ford vetoed proposed legislation seeking to enlarge or prolong price controls in ways that he thought unwarranted, and his vetoes were sustained. 121 Cong. Rec. 24,476 (1975) (Senate); *id.* at 28,489-90 (Senate).

Against the background of this battle of presidential and congressional vetoes, the Conference Committee invited the Administration to confer over the differing congressional proposals before it. Congress was determined to continue crude oil price controls. But the President would veto any bill containing inflexible price control provisions. *See* H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess. 306 (1975) (minority views).[16]

Within these constraints, Congress and the President reached a hard-bargained compromise whose essential elements again included price controls, decontrol authority, and legislative veto provisions. The Senate Report stated that the legislative veto provisions were "necessary" in view of the President's announced intention to decontrol crude oil prices, "an action with such enormous economic implications [that it] must first be reviewed by the Congress." S. Rep. No. 26, 94th Cong., 1st Sess. 47-48 (1975). *See also* H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess. 40, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1802. The Senate as a whole had specifically voted to retain veto powers in response to Senator Jackson's argument that the veto provisions were a "safeguard," the "abdicat[ion]" of which would "do more harm to the economy" than "anything" of which he could think. 121 Cong. Rec. 9857 (1975). Similarly, the House Report stated that legislative vetoes over decontrol authorities were necessary because "Congress must be assured that the President has made a rational selection of criteria." H.R. Conf. Rep. No. 340, 94th Cong., 1st Sess.

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[16] Neither the House bill nor the Senate bill had garnered the two-thirds majority necessary to override a potential presidential veto. *See* 121 Cong. Rec. 9868 (1975) (Senate vote seven votes short); *id.* at 29,852 (House vote 34 votes short).

40, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1802.[17]

In putting together this compromise legislative package, the Conference Committee specifically deleted a severability clause, *compare* S. 622, § 128, 94th Cong., 1st Sess., *reprinted in* 121 Cong. Rec. 9868, 9875 (1975) *with* S. Conf. Rep. No. 516, 94th Cong., 1st Sess. (1975), thus clearly demonstrating that the EPCA was intended to stand or fall as a whole. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). This is particularly significant, because Congress was well aware of the uncertain constitutional status of the legislative veto. *See* Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv. J. Legis. 735, 737-38 n.7 (1979).[18]

* * * *

In short, it is "evident" that Congress "would not have enacted those provisions [of the EPAA and the EPCA] which are within its power, independently of that which is not." *Chadha*, 103 S. Ct. at 2774. Severance of the veto authority alone would delete the safety valve that

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[17] In the Conference Report recommending amendments to the EPCA, the same Congress in its next session characterized the legislative veto as an integral part of "the EPCA decisionmaking principle" that gave Congress "primary responsibility for assessing appropriateness of oil price increases." S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2027, 2033.

[18] Severability clauses were incorporated in related legislation enacted during the same time period. For example, between enactment of the EPAA and the EPCA, severability clauses were included in the Federal Energy Administration Act of 1974, § 27, Pub. L. No. 93-275, 88 Stat. 96, 115, and the Energy Reorganization Act of 1974, § 311, Pub. L. No. 93-438, 88 Stat. 1233, 1253. Subsequently, such a clause was included in the Department of Energy Organization Act, § 706, Pub. L. No. 95-91, 91 Stat. 565, 607 (1977), and the Energy Security Act, § 176, Pub. L. No. 96-294, 94 Stat. 611, 678 (1980).

Congress insisted on retaining.[19] Severance of the decontrol provisions as well would delete authority the President had demanded as a condition of signing the bill into law. In either case, severance is impermissible because the resulting statute would be "quite different" from the bill passed by Congress and signed by the President. *See Sloan v. Lemon*, 413 U.S. at 834.

III. THE SUBSTANCE AND DURATION OF THE PRICE CONTROL REGULATIONS WERE UNCONSTITUTIONALLY INFLUENCED BY THE VETO POWER RESERVED TO AND USED BY CONGRESS.

The price control regulations were pervasively influenced by the existence, threatened use, and actual use of the veto power. Successive Presidents, and especially President Ford, were prevented from modifying or terminating price controls in the manner they saw fit. This result was constitutionally improper whether or not the legislative veto provisions are severable from the remainder of the statutes.

Regulations which have not been vetoed may nonetheless be unconstitutional if their substance or duration has been influenced by the retention and use of legislative veto power. In *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983), Congress had invoked the one-house veto provisions incorporated in the Presidential Recordings and Materials Act to reject successive sets of regulations promulgated by the General Service Administration. The court found the legislative veto provisions in the Act to be severable. *Id.* at 971. Nonetheless, relying

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[19] *See McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) ("[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong" because "[o]therwise, the scope of the power would be enlarged beyond the legislature's intent").

on *Chadha*, the court struck down as "tainted" the regulations finally found acceptable by Congress, *id.* at 969, concluding that "[i]n the absence of the repeated exercise of the legislative veto, the regulations would not have undergone the changes they did." *Id.* at 968.

Here, the existence of congressional coercion is manifest. Virtually from the moment President Ford announced in the 1975 State of the Union message that he intended to decontrol crude oil, *see* I Pub. Papers of Pres. Ford 41 (Jan. 15, 1975), he was subjected to strong congressional opposition.[20] In March 1975, Representative Dingell (Chairman of the House subcommittee with oversight responsibility for implementation of the EPAA) and Representative Ullman (Chairman of the House Ways and Means Committee) met with FEA Administrator Zarb and told him that Congress would reject immediate decontrol. *See* Frank G. Zarb Memorandum to the President, p. 1 (March 8, 1975). App. I, pp. 284a-85a.[21] On April 30, 1975, Majority Leader Mansfield warned that "unilateral" decontrol by the President would be vetoed by the Senate. *See* Max Friedersdorf Memorandum to the President, with attachments (May 1, 1975). App. I, p. 308a. President Ford retreated to a 25-month decontrol plan, 40 Fed. Reg. 19,219 (1975), but withdrew it in the face of a likely congressional veto. *See* Bruff & Gellhorn, *supra* note 20, at 1392. He then successively issued 30- and

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[20] Earlier, in July 1974, the Federal Energy Administration (FEA) had proposed to exempt residual fuel oil from allocation controls, 39 Fed. Reg. 24,669 (1974), App. H, pp. 201a-07a, but was forced to withdraw its proposal after a group of Northeastern congressmen convinced the agency that the proposal would be vetoed. Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study In Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1391 (1977).

[21] The documents set forth in App. I were obtained from the public files of the Gerald R. Ford Library in Ann Arbor, Michigan, and were included in the record before the court of appeals.

39-month decontrol orders, both of which were vetoed by majority vote in the House. *See infra* p. 26.[22]

Where Congress is actively interested in a subject, as it was in energy policy, the very existence of congressional veto power is enough to distort the Executive's exercise of delegated powers. The "threat of a veto is much more plausible than the threat of a statutory amendment, making administrators more likely to succumb to congressional interference." *Consumer Energy Council*, 673 F.2d at 475 n.213. *See also Hearing Before Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 2-3 (1983) (statement of Sen. Grassley) ("It is not the actual exercise of the [legislative veto] tool that is so important, but the threat of such an exercise"). Where the veto has actually been exercised, the threat is especially persuasive.

Presidential action under the EPCA well illustrates the effect of such pressure. The Administration's "sequence

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[22] This sequence was contemporaneously described as follows:

> "In January the President advocated immediate decontrol as the most effective way to . . . decrease our dependence on OPEC oil supplies and price policy. However, the Congress objected to immediate decontrol. As we began our hearings in the Commerce Committee, it was clear that a majority of that subcommittee . . . would not accept immediate decontrol because it feared the negative economic impacts that would result . . . .
>
> The President responded to this concern by publishing . . . his second decontrol plan, which called for gradual decontrol over a 25-month period. Once again, the Congress expressed dissatisfaction . . . . Still hopeful of agreement, the President submitted for congressional consideration a third plan which not only placed a $13.50 cap on domestic oil prices but also lengthened the decontrol period to 30 months. This plan was the one that the House rejected last week on the grounds that the $13.50 cap was too high.
>
> Now, the President has presented to Congress a fourth plan [the 39-month amendment] which meets [this] criticism . . . ."

121 Cong. Rec. 25,874 (1975) (Rep. Brown); *see id.* at 25,880 (Rep. Leggett).

of decontrol" under the EPCA, for example, was determined in part by "the necessity to avoid having more than one decontrol proposal at a time before the Congress" in order to "minimiz[e] the constituencies opposed to any one action." Frank G. Zarb Memorandum to the President on Deregulation of Naphtha-Based Jet Fuel, pp. 1, 4 (undated attachment to Frank G. Zarb Memorandum to Elliot Richardson, *et al.*, Sept. 9, 1976). App. I, pp. 295a-98a. This cautious strategy resulted from continuing fear of congressional veto and tended to rule out more controversial steps, such as decontrolling crude oil, at an early stage. Other decontrol proposals were held hostage, under threat of veto, to secure the President's support for extraneous congressional measures.[23]

Thus, the threat of congressional veto shaped decontrol measures under the EPCA as it had under the EPAA. Congress thereby was enabled "to control the executive without going through the full lawmaking process." *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982) (per curiam). This "shared administration" of the EPAA and the EPCA contravened the principles of separation of powers. *See Consumer Energy Council*, 673 F.2d at 474.[24] Nor

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[23] *See* Frank G. Zarb Memorandum to the President on Petroleum Marketing Practices Act, p. 2 (June 9, 1976) ("Chairman Dingell has made it clear that some form of dealer protection legislation must be enacted before our gasoline decontrol proposal will be accepted by the Congress"). App. I, p. 289a. *Accord* Frank G. Zarb Memorandum to the President on Gasoline Decontrol, p. 2 (Dec. 30, 1976). *Id.*, p. 300a.

[24] In *Consumer Energy Council*, 673 F.2d at 475 n.213, the D.C. Circuit noted that the legislative veto is "significantly worse" than informal congressional interference with administrative decisionmaking. An example of such informal interference was considered in *Texas Medical Ass'n v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), where the court invalidated regulations promulgated by HEW because of undue congressional pressure on the agency, noting that "agency action is invalid if based, even in part,

does due process condone the use of a decisionmaking procedure that compels the Executive to tailor the exercise of delegated rulemaking authority to the political pressures of Congress.

IV. IF THE PRICE CONTROL REGULATIONS ARE TO BE ENFORCED AT ALL, EFFECT MUST BE GIVEN TO THE VETOED DECONTROL ORDERS.

On two occasions in July 1975, the House of Representatives vetoed decontrol orders that would have phased out the price controls on crude oil. The FEA had promulgated the first of these decontrol orders on July 14, 1975. It provided for phased decontrol at 3.3 percent per month over a 30-month period. 40 Fed. Reg. 30,030, 30,035-36 (1975). The House vetoed this 30-month decontrol order on July 22, 1975. 121 Cong. Rec. 23,983-84 (1975).[25] Following that veto, the FEA promulgated another decontrol order that would have phased out price controls over a 39-month period. 40 Fed. Reg. 31,741 (1975). The House vetoed that order as well, on July 30, 1975. 121 Cong. Rec. 25,881-82 (1975).[26]

Insofar as these exercises of legislative veto power are concerned, this case precisely parallels *Chadha*: the congressional vetoes of the Executive's decontrol orders violated the Constitution just as surely as did the congres-

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on pressures emanating from congressional sources." *Id.* at 306. When such pressures affect the agency's decisionmaking, "the resulting judgment is unlawful ab initio and not entitled to the sanctuary accorded untainted agency judgments." *Id.* at 306-07. *See also Sierra Club v. Costle*, 657 F.2d 298, 408-09 (D.C. Cir. 1981).

[25] Congress' unconstitutional exercise of legislative veto power in this case had a tremendous financial impact upon petitioners. In July 1975, the average ceiling price for crude oil subject to DOE's price regulations was $5.25. The average price of uncontrolled crude oil was $12.25. *See* 40 Fed. Reg. 30,030 (1975).

[26] In this context, the first vetoed decontrol order is the critical one, since the 39-month order would not have been promulgated had the 30-month order not been vetoed.

sional veto of the Attorney General's suspension of Mr. Chadha's deportation. Just as this Court gave effect to the vetoed suspension order in *Chadha*, TECA at a minimum should have given effect to the vetoed decontrol orders here.

The court below nevertheless refused to do so, on the unusual ground that the decontrol orders were invalid under the EPAA when promulgated in 1975. The court said that the vetoed orders could be ignored because (1) by their terms they were not limited to a period of 90 days, as purportedly required by EPAA § 4(g)(2), and (2) their duration extended beyond the expiration date of the EPAA. App. A, p. 39a. These belated objections to the President's action are without merit.[27]

It was well understood that the decontrol orders would be reviewed by Congress at 90-day intervals.[28] The transmittal letters for both the 30-month and the 39-month decontrol orders explicitly referred to the statutory 90-day provision and stated that the decontrol orders were "in accordance with § 4(g)(2) of the Act." *See* H.R. Doc. No. 216, 94th Cong., 1st Sess. 1 (1975); H.R. Doc. 223, 94th Cong., 1st Sess. 1 (1975). During the floor debate on the resolution to veto the 30-month decontrol

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[27] The government itself never questioned the validity of the decontrol orders until it became necessary to do so in this litigation to avoid the implications of *Chadha*. The orders were published in July 1975 in the Federal Register and properly promulgated pursuant to public notice and comment procedures. 40 Fed. Reg. at 30,030. The FEA transmitted the orders to Congress for its approval and defended them in congressional hearings. Congress did not question the President's authority to issue the orders under EPAA § 4(g)(2).

[28] The EPAA clearly authorized periodic renewal of a decontrol order. *See* H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 19, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688, 2696 ("at the expiration of the 90 days that an amendment applies to an oil or product, a new amendment applicable to such oil or product could take effect").

order, it was recognized that there would be periodic congressional review of the order based on section 4(g)(2). *See* 121 Cong. Rec. 23,960 (1975) (Rep. Anderson); *id.* at 23,963 (Rep. Eckhardt); *id.* at 23,977 (Rep. Rhodes).[29]

Nor is there any support for the court's conclusion that the decontrol orders were invalid because they were not specifically limited in duration to the expiration date of the EPAA. At the time the 30-month decontrol order was promulgated, no one suggested that its duration rendered it invalid, although both Congress and the Executive were acutely aware of the impending expiration of the EPAA. If the statute had expired as scheduled, the decontrol order necessarily would have expired as well. But since the statute in fact was extended, the decontrol order, along with all other regulations of unspecified duration, would have continued in effect as a matter of course.[30]

In sum, even if the legislative veto provisions were severable and even if price control regulations actively shaped by the use of the veto power were otherwise enforceable, this Court should reverse the court below so as to effectuate the 30-month presidential decontrol order. To fail to do so would be to uphold the actual exercise of an unconstitutional legislative veto provision.

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[29] Even if the court was correct in ruling that the decontrol order had to be limited to 90 days, it should not have invalidated the order entirely, but merely limited the order's effectiveness to the 90-day period authorized by the statute. *See Rowell v. Andrus*, 631 F.2d 699, 704 (10th Cir. 1980).

[30] Reenactment of a statute leaves "the jurisdiction of [an] agency" undisturbed "as to those provisions which [are] continued under the new statute." *Pentheny, Ltd. v. Government of the Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1984

Other counsel for petitioners are listed on the inside front cover.

APPENDIX A

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-103

EXXON CORPORATION, MOBIL OIL CORPORATION, and MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, Secretary of Energy,
Defendants.

No. (N.D. Tex.) CA-3-75-0836-W

On Certification From the United States District Court for the Northern District of Texas

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No. 10-51

IN RE: THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION, M.D.L. 378

On Certification from the United States District Court for the District of Kansas

(Argued: May 10, 1984 Decided: July 6, 1984)

KEITH A. JONES, Fulbright & Jaworski, Washington, D.C., with whom M. W. Parse, Jr., Jerry E. Smith and A. Frank Koury of the same firm, Edward de la Garza, Exxon Corporation, Houston, Texas, R. Bruce McLean, Daniel Joseph and David A. Holzworth, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., and William C. Streets, Mark J. Forsch and Gail F. Schultz, Mobil Oil Corporation, Fairfax, Virginia, were on brief for plaintiffs in No. 5-103.

WARREN CHRISTOPHER, O'Melveny & Myers, Washington, D.C., with whom Carl R. Schenker, Jr., Aaron S. Bayer and Jacob M. Lewis of the same firm, and Joseph W.

Kennedy, Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas, were on brief for plaintiffs in No. 10-51.

LARRY P. ELLSWORTH, Assistant General Counsel, Thomas C. Newkirk, Don W. Crockett, David A. Engels, Marcia Sowles and John L. Gurney, Department of Energy, Washington, D.C., and Richard K. Willard, Acting Assistant Attorney General, with whom Anthony J. Steinmeyer and Douglas Letter, Department of Justice, Washington, D.C., were on brief for defendants in Nos. 5-103 and 10-51.

ANDREW P. MILLER, Dickstein, Shapiro & Morin, Washington, D.C., with whom Stephen G. Wielgoz of the same firm, James F. Flug and Paula Dinerstein, Lobel, Novins & Lamont, Washington, D.C., Bernard Nash and Edward G. Modell, Blum & Nash, Washington, D.C., David Frohnmayer, Attorney General of Oregon, Salem, Oregon, Irving I. Kimmelman, Attorney General of New Jersey, Trenton, New Jersey, Francis X. Bellotti, Attorney General of Massachusetts, Boston, Massachusetts, and Travis Medlock, Attorney General of South Carolina, Columbia, South Carolina, were on brief for intervenors States in No. 10-51.

KATHLEEN O. ARGIROPOULOS, Air Transport Association of America, Washington, D.C., with whom Richard T. Williams, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, were on brief for intervenor Air Transport Association of America.

HAROLD E. KOHN, Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania, with whom Joseph C. Kohn of the same firm, Alexander B. Mitchell, Sargent, Klenda, Haag & Mitchell, Wichita, Kansas, Philip P. Kalodner, Philadelphia, Pennsylvania, and Lee Ann Glanton, Philadelphia, Pennsylvania, were on brief for intervenors Geraldine H. Sweeney, RJG Cab, Inc., National Freight, Inc. and Philadelphia Electric Company in No. 10-51.

Before CHRISTENSEN, BECKER, and BROWN, Judges

BECKER, Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT *

Nature of Actions and Original Jurisdiction

These are two consolidated actions, of which this Court has original jurisdiction under § 211(c) of the Economic Stabilization Act of 1970 found in 12 U.S.C. § 1904 Note, and incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), P.L. 93-159, 15 U.S.C. § 754(a)(1) as amended by the Energy Policy and Conservation Act (EPCA), P.L. 94-163, 15 U.S.C. § 754.

Original jurisdiction of each of these consolidated actions was acquired when the separate District Courts determined that, in an action pending therein, a substantial constitutional issue existed, and certified that issue to this Court. The separate issues so certified by

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* The following abbreviations and shortened titles are used herein: EPAA for Emergency Petroleum Allocation Act; EPCA for Energy Policy and Conservation Act; No. 5-103 for *Exxon Corporation, et al. v. United States Department of Energy, et al.*; No. 10-51 for *In Re: The Department of Energy Stripper Well Exemption Litigation*; Exxon for Exxon Corporation; Mobil for Mobil Oil Corporation, and Mobil Oil Exploration & Producing Southeast, Inc.; *Chadha* for *Immigration and Naturalization Service v. Chadha*; *Dyke* for *Gulf Oil Corporation v. Dyke, et al.*; DOE for United States Department of Energy; USCCAN for U.S. Code, Congressional and Administrative News; Bruff and Gellhorn for Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*; *Chevron* for *Chevron Oil Co. v. Huson*; *Northern Pipeline* for *Northern Pipeline Co. v. Marathon Pipe Line*; Breyer for Breyer, *The Legislative Veto After Chadha*; and *Annotation* for *Annotation: United States Supreme Court Views as to Retroactive Effect of Its Own Decisions Announcing New Rules.*

the separate District Courts are substantially the same. The certificates by the District Courts are set out hereinafter.

A. The Parties

Because this Court has original jurisdiction in these two consolidated actions, the parties in each action will be designated as plaintiffs and defendants, rather than appellants and appellees. The numbers, styles and parties in these two actions are as follows:

No. 5-103.

Exxon Corporation, et al.

v.

United States Department of Energy, et al.

On Certification from the
Northern District of Texas

No. (N.D. Tex.) CA-3-75-0836-W.

Plaintiffs.

The remaining plaintiffs in this original action (consolidated) are the following parties:

Exxon Corporation

Mobil Oil Corporation

Mobil Oil Exploration &
Producing Southeast, Inc.

Dorchester Gas Producing Company and Dorchester Gas Processing Company, originally plaintiffs in the District Court, have settled their controversy with the Department of Energy and are not parties to this proceeding.

Defendants.

The defendants in this original action are as follows:

United States
Department of Energy

Donald P. Hodel,
Secretary of Energy.

No. 10-51.

In Re: The Department of Energy
Stripper Well Exemption Litigation,
M.D.L. No. 378.

On Certification from the
District of Kansas.

This multidistrict civil litigation in which the parties are listed as follows:

Plaintiffs.

Energy Reserves Group, Inc.
Suburban Propane Gas Corporation
Marathon Oil Company
Sklar & Phillips Oil Company
Sierra Petroleum Co., Inc.
Braden-Zenith, Inc.
Mobil Oil Corporation
Mobil Producing Texas & New Mexico, Inc.
Willie Ansley Bryson
Stelbar Oil Corporation, Inc.
The Standard Oil Company, an Ohio Corporation
Theo M. Glenn, Jr.
Eleanor E. Glenn
Robert Dale Brandenburg
Texaco Inc., a Delaware Corporation
Aminoil USA, Inc.
Continental Oil Co., Inc. (Conoco)
Sun Exploration and Production Co.
Otis C. Peavey
Everal A. Peavey
Gladys G. Peavey
Ronald J. Peavey
Kenneth Wellbrock
Nora C. Binder
Fred J. Jorgensen
Arlene M. Wolfe
Dora J. Johnson

Robert F. Johnson
Marilyn J. Johnson
Howard Stout, Co-Trustee of the
Charles S. Page Trust
Lorena Houlton, Co-Trustee of the
Charles S. Page Trust
Mary E. Hall, Co-Trustee of the
Charles S. Page Trust
Gulf Oil Corporation
Robert E. Davis
Energy Consumers and Producers Association, Inc.
(formerly Oklahoma Association of Energy Consumers and Producers)
Ruthven, Inc.
Pioneer Operations Company, Inc.
George R. Jones
Rex Archer
T. B. Wilcox, III
Wico Oil Company
Jack Fena
James Tasheff
Robert G. Braden
National Cooperative Refinery Association
Estate of Martin Wunderlich
Estate of Charles F. Curry
Guy E. Stanley, Jr.
J. R. Dougherty
John B. Dougherty
Estate of Milton McGreevy
Herndon Drilling Company
Rhude & Fryberger, Inc.
Petroleum Management, Inc.
Atlantic Richfield Company
W. R. Murfin d/b/a Murfin Drilling Company
Champlin Petroleum Company
Exxon Corporation
Hunt Oil Company
Crystal Oil Company
Ira Thomas May
Muskegon Development Company
Paul B. Fletcher, Sr.

Anadarko Production Company
IU International Oil & Gas, Inc.
Wood Oil Co.
Dan Wallace d/b/a Columbus Oil Co.
Will I. Lewis Enterprises, Inc.
Jimmie Austin d/b/a Austin Drilling Company
Santa Fe Energy Company
George G. Anderman
Donald R. Kirby
Patricia Anne Leonard
Mary Kay Harrington
A. F. McMillan
Zula McMillan
Farmers Crude Production Co. (formerly Farmers Petroleum Cooperative, Inc.)
William C. Kirkwood d/b/a Kirkwood Oil and Gas Company
Petroleum Corporation of Texas

Defendants.

United States Department of Energy
Secretary of the United States Department of Energy

Intervenors.

Total Petroleum, Inc.
Tenneco Oil Company
Pennzoil Company
Tosco Corporation
Ashland Oil, Inc.
Texas City Refining, Inc.
American Independent Refiners Association (formerly American Petroleum Refiners Association)
Chevron U.S.A., Inc.
Farmland Industries, Inc.
Shell Oil Company
The State of Michigan
The State of Alabama
The State of California
The State of Arkansas
The State of Kansas

The State of Delaware
The State of Iowa
The State of North Dakota
The State of Rhode Island
The State of Texas
The Commonwealth of Virginia
The State of West Virginia
The State of Mississippi
The State of Montana
The State of Minnesota
The State of Colorado
The Commonwealth of Pennsylvania
The State of Georgia
The State of South Carolina
The State of Vermont
The State of Nebraska
The State of North Carolina
The State of Illinois
The State of Ohio
The State of South Dakota
The State of Wisconsin
The State of Oregon
The State of Maryland
The State of New Jersey
The State of Tennessee
The State of Nevada
The State of Hawaii
The State of New Mexico
The Commonwealth of Puerto Rico
The Territory of Guam
The U.S. Virgin Islands
The District of Columbia
The State of New York
The Commonwealth of Massachusetts
The State of Connecticut
The State of New Hampshire
The State of Maine
The State of Louisiana
The State of Utah
The State of Idaho
The State of Indiana
The State of Wyoming

National Freight, Inc.
Philadelphia Electric Co.
Payne 22, Inc.
Anthony Monaco
Rex Shipley
Robert Sharo
George Theodore
Harvey Hatfield
Richard Vielhaber
Nicholas Peto
National Oil Jobbers Council
Geraldine H. Sweeney
RJG Cab, Inc.
Air Transport Association of America
Virginia Electric and Power Company
The Jobbers' Group

B. Certificates of the District Courts

The material parts of the determinations and certificates of the District Courts follow:

In No. 5-103 by United States District Court for the Northern District of Texas.

Pursuant to section 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, the court hereby certifies to the Temporary Emergency Court of Appeals the following substantial constitutional issue raised by plaintiff Exxon Corporation in its Supplemental Motion for Summary Judgment:

> Whether the Emergency Petroleum Allocation Act of 1973 and the Energy Policy and Conservation Act are unconstitutional under *Immigration & Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983), in that they contain unconstitutional one-house legislative veto provisions that are not severable from the remainder of those statutes, thereby rendering void the regulations promulgated pursuant thereto.

(Style, title, words, date and signature omitted.)

In No. 10-51 by United States District Court for the District of Kansas.

On November 14, 1983, the plaintiffs moved to certify three constitutional issues to TECA, to vacate the referral of factfinding to the OHA, and to release the escrowed funds. The three constitutional issues are stated by the plaintiffs as follows:

> 1) Whether the Emergency Petroleum Allocation Act, as amended, must be declared unconstitutional, *ab initio*, because it contains an invalid and inseverable one-house legislative veto provision that was twice utilized to the detriment of plaintiffs.
>
> 2) Whether the Oil Pricing Policy added as section 8 to the Emergency Petroleum Allocation Act by section 401 of the Energy Policy and Conservation Act must be declared unconstitutional, *ab initio*, because it contains three invalid and inseverable one-house legislative veto provisions and imposed price controls to the detriment of plaintiffs.
>
> 3) Whether MDL No. 378 must be dismissed for lack of subject matter jurisdiction in view of the constitutional invalidity of the Emergency Petroleum Allocation Act, as amended, and section 401 of the Energy Policy and Conservation Act.

* * * *

IT IS THEREFORE ORDERED that the three constitutional issues raised by the plaintiffs and set out verbatim in this Memorandum and Order, *supra* p. 4 (quoted above), be certified to the Temporary Emergency Court of Appeals.

IT IS FURTHER ORDERED that the plaintiffs' motions to vacate the referral of factfinding to the OHA and to release the escrowed funds be held in abeyance pending TECA's resolution of the constitutional issues.

IT IS FURTHER ORDERED that OHA continue uninterrupted with its factfinding mission.

IT IS FURTHER ORDERED that this Court retain jurisdiction over this case and over the escrowed frund [sic] to the maximum extent consistent with the certification of constitutional issues to TECA. (Words in parentheses added. Style, title, words, date and signature omitted.)

C. Contentions of Parties

Plaintiffs' Contentions in No. 5-103.

In No. 5-103 the contentions of Plaintiffs Exxon Corporation (Exxon), Mobil Oil Corporation, and Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) in their joint brief and joint reply brief are as follows:

a. Exxon and Mobil have standing to challenge the EPAA and the EPCA.

b. The Constitutional principle announced in *Immigration and Naturalization Service v. Chadha* (*Chadha*), 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), is not limited to legislative veto provisions enacted after the date of decision.

c. The EPAA, both as originally enacted and as amended by Title IV of the EPCA, is unconstitutional in its entirety because of the inclusion of inseverable legislative veto provisions.

1. Congress would not have conferred decontrol authority on the President without retaining a legislative veto because:

(a) Congress' central purpose in enacting the EPAA was to deprive President Nixon of his unchecked discretion over whether to impose allocation controls, and

(b) Congress' central purpose in enacting the EPCA was to prevent President Ford

from carrying out his announced intention of lifting allocation and price controls.

2. The inseverability of the legislative veto provisions requires invalidation of the entire EPAA both as originally enacted and as amended by Title IV of the EPCA.

(a) Decontrol authority was inseverable from the remainder of the EPAA and Title IV of the EPCA because decontrol authority was a functionally integral part of the overall statutory scheme and because decontrol authority was a necessary ingredient of the political compromise leading to enactment.

(b) Preservation of the regulatory program after *Chadha* cannot be rationalized on other grounds.

d. The defendants' threshold contentions regarding standing and retroactivity are insubstantial.

1. Exxon and Mobil have standing.

2. The rule announced in *Chadha* is retroactive.

e. The legislative veto provisions in the EPAA and the EPCA are not severable from the statutory program of mandatory price controls.

1. This Court's decision in *Gulf Oil Corporation v. Dyke, et al.* (*Dyke*), —— F.2d ——, (TECA Nos. 9-80, 9-81, April 17, 1984), does not dispose of this case.

2. The defendants rely upon an incorrect test of severability.

3. The EPAA contained no implicit severability clause.

4. The decision-making structure of the EPAA and the EPCA was Constitutionally tainted by the presence of a mechanism for legislative veto.

Plaintiffs' Contentions in No. 10-51.

Plaintiffs in No. 10-51 (listed elsewhere) filed a joint brief and a joint reply brief. In those briefs their contentions are as follows:

a. The EPAA and the EPCA are unconstitutional *in toto* because the legislative veto provisions are inseverable, and DOE's price control regulations therefore are void.

   1. Severance is impermissible as to functionally integral provisions of compromise legislation which were necessary to procure passage by Congress or signature by the President.

   2. The EPAA would not have been enacted in the same form without its invalid provisions.

   3. The EPCA would not have been enacted in the same form without its invalid provisions.

b. Even assuming that the legislative veto provisions of the EPAA and the EPCA are severable, DOE's price control regulations cannot Constitutionally be enforced.

   1. If DOE's regulations are to be enforced at all, effect must be given to unconstitutionally vetoed decontrol amendments.

   2. DOE's price control regulations are unconstitutional because they were pervasively tainted by the veto power reserved to, and used by, Congress.

c. There are no procedural bars to relief.

Intervenors' Contentions in No. 10-51.

In No. 10-51 the intervenors States filed a joint brief. In this brief their contentions were as follows:

a. This Court's decision in *Dyke, supra,* holding the legislative veto to be severable from the remainder of the EPAA and EPCA, is dispositive of this case.

b. Because the President's decontrol proposals were without effect, plaintiffs have not suffered any injury.

   1. Even in the absence of the Congressional vetoes, the decontrol plans were not capable of taking effect without further legislation.

   2. Congressional enactments subsequent to the last exercise of a legislative veto retroactively and validly rejected the decontrol proposals in issue.

c. The existence of the legislative veto provisions did not "taint" the regulations.

d. Even if, *arguendo*, *Chadha* mandated a halt to price control enforcement, that decision should not be retroactively applied.

In No. 10-51 the intervenor Air Transport Association of America filed a brief. In this brief its contentions were as follows:

a. Plaintiffs are foreclosed by F.R.Civ.P. 60(b) and by waiver from pursuit of this appeal.

b. Plaintiffs lack standing to challenge the legislative veto provisions of the EPAA and EPCA.

c. The substantive provisions of the EPAA and the EPCA can and should be severed from the provisions for a one-House legislative veto.

d. Plaintiffs seek an improper and unduly broad remedy.

In No. 10-51 the intervenors Geraldine H. Sweeney, RJG Cab, Inc., National Freight, Inc. and Philadelphia Electric Company filed a joint brief. In this brief their contentions were as follows:

a. Consistent with the intent of Congress both the Presidential decontrol authority and the legislative veto should be severed from the statutes.

b. Plaintiffs' argument that the critical test is not the Congressional intent but whether Congress could have passed the EPAA and EPCA over the President's opposition is without merit.

   1. There is no real evidence either that the President would have vetoed the EPAA and EPCA without presidential decontrol (subject to legislative veto) provisions, or, that had he done so, Congress would have been unable to override his veto.

   2. There is no legal authority for plaintiffs' position that a determination of severance be based on speculation as to what Congress could have done in the face of presidential veto.

c. Even if the legislative vetoes alone were severed from the statutes, plaintiffs could not benefit from the two crude oil phase-out amendments actually proposed nor from those which might have been proposed.

   1. The two phase-out crude oil amendments were null and void *ab initio* since they were not within the President's statutory authority and the President agreed retroactively to the elimination of the "amendments" from the regulatory scheme, therefore plaintiffs were not injured by either of the legislative vetoes.

   2. Even if the 30-month decontrol provision were to be given effect, it would be only for the period from July 25 to September 1, 1975.

   3. No effect can be given to phase-out amendments which were never proposed to the Congress.

   4. Plaintiffs are barred by laches from seeking now to implement decontrol measures vetoed in July, 1975.

d. The challenge to the legislative veto provides plaintiffs no standing to challenge the mandatory price regulations since they were not subject to the legislative veto.

Defendants' Contentions
In Nos. 5-103 and 10-51.

In consolidated actions Nos. 5-103 and 10-51 defendants United States Department of Energy and Donald P. Hodel, Secretary of Energy, filed a single joint brief and a single reply brief. In those briefs their contentions are as follows:

a. The legislative veto provisions are severable from the EPAA and EPCA.

b. Neither the EPAA and EPCA nor the underlying price control regulations should be retroactively invalidated.

1. There is no justification for declaring the EPAA and EPCA void *ab initio.*

(a) The *Chadha* ruling is one of first impression.

(b) Retroactive invalidation of the EPAA and the mandatory pricing regulations would not further the purpose of the Supreme Court's holding in *Chadha.*

(c) Retroactive invalidation of the EPAA would be inequitable.

2. The mandatory petroleum pricing regulations are not unconstitutionally "tainted" and should not be retroactively modified by this Court.

(a) Plaintiffs lack standing to raise their speculative argument.

(b) Plaintiffs' argument that the mere existence of the legislative veto "chilled" the President's actions is rank speculation unsupported by the record.

(c) This Court should not retroactively modify the price control regulations.

D. *Legislative History and Statutory Provisions of the "Emergency Petroleum Allocation Act of 1973," Including the One-House Veto of § 4(g)(2)*

In 1973, the 93rd Congress, First Session, found that there was a National shortage of crude oil and actual or imminent shortages of refined petroleum products. Early in 1973 that Congress, by the "Economic Stabilization Act Amendments of 1973" had authorized, but did not require, the President to order mandatory allocations of gasoline and other petroleum products for purposes including the assurance of distribution thereof to meet the essential needs of various sections of the Nation. Instead of imposing a program of mandatory allocation of those products, the President decided to rely on a voluntary program, announced May 10, 1973. This voluntary program encouraged the major companies to share their supplies of those products with their competitors. Later in 1973 the 93rd Congress, First Session, found that the voluntary program had failed and was "doomed to even greater failures." These findings were recorded in House Report No. 93-531, adopted in the Report No. 93-628 of the Committee of Conference of the House and the Senate. 2 U.S. Code, Congressional and Administrative News (USCCAN), 93rd Congress, First Session, (House Report No. 93-531) 2582 at pages 2583, 2588, (Conference Report No. 93-628) 2688.

In November 1973, because of the existing emergency, growing in intensity, that Congress with the approval of the President enacted into law the mandatory Emergency Petroleum Allocation Act of 1973, authorizing and directing the President to adopt within 10 days, and to implement within 15 days thereafter a program for the mandatory allocation (and pricing) of crude oil, residual

and refined petroleum products in the manner, and for the purposes, defined in the EPAA, which became effective November 27, 1973. P.L. 93-159, 87 Stat. 627, 15 U.S.C. 751, *et seq.*

The One-House Veto.

The EPAA contained in § 4(g)(2) authority for Presidential proposals of exemptions of crude oil and petroleum products and for a "one-House" veto thereof in the following provision:

> (2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) *exempting such oil or product from such regulation for a period of not more than ninety days.* The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment. (Emphasis added.)

E. *Legislative History and Statutory Provisions of the Energy Policy and Conservation Act, Including the One-House Veto of §§ 551 and 552*

In December 1975, because of the expiration of the mandatory program of the EPAA, growing shortages of crude oil and refined petroleum products, interruption of imported crude oil and petroleum products by the Arab embargo, the excess of National natural gas consumption over discoveries beginning in 1968, and experience under the mandatory program of the EPAA, the 94th Congress, First Session, after temporary extension of the EPAA, enacted and the President approved the Energy Policy and Conservation Act, which became effective December 23, 1975. P.L. 94-163, 89 Stat. 871, 42 U.S.C. 6201, Note.

The relevant legislative history of the EPCA is recorded in House Report 94-340, Senate Conference Report No. 94-516, including the Joint Explanatory Statement of the Committee of Conference. 2 USCCAN, 94th Congress, First Session, (House Report) 1762, (Portion of Senate Conference Report No. 94-516, containing Joint Explanatory Statement of the Committee of Conference) 1956.

Among other things, the EPCA in Title IV amended and extended the program of the EPAA and converted the EPAA from a mandatory authority to a standby authority to permit the President to exempt an oil or product from regulation, or to gradually and selectively exempt an oil or a product from all or some control by allocation or price. To accomplish these purposes the EPAA was transformed from a temporary to a permanent law in conjunction with the conversion to a standby authority, with power in the President to reimpose controls on an exempted oil or product. The "one-House" veto, § 4(g)(2) of the EPAA was amended and expanded by the EPCA.

The portions of the EPAA and EPCA under critical review in these actions are the provisions providing for Congressional review, authorizing the "one-House" veto of the proposals of the President to exercise his authority to exempt for a limited time, an oil or product from regulation wholly, selectively, or in a phased manner. An exercise of this authority by an "energy action" of the President amending the mandatory regulations was provided. 2 USCCAN, 94th Congress, First Session, *supra*, at pages 1818, 2058.

The Congressional review provisions of the EPCA were those contained in the House Bill adopted by the Committee of Conference. In § 401 of the EPCA the President was authorized to report to Congress on February 15, 1977, and at other times, and could submit an "energy action" subject to § 551 of the EPCA. Section 551 (and associated § 552) provided for the Congressional review by a "one-House" veto now found to be unconstitutional in the *Chadha* case, *supra*.

The critical provisions, § 551 and § 552 of the EPCA, are as follows:

> Sec. 551. (a) For purposes of this section, the term "energy action" means any matter required to be transmitted, or submitted to the Congress in accordance with the procedures of this section.
>
> (b) The President shall transmit any energy action (bearing an identification number) to both Houses of Congress on the same day. If both Houses are not in session on the day any energy action is received by the appropriate officers of each House, for purposes of this section such energy action shall be deemed to have been transmitted on the first succeeding day on which both Houses are in session.
>
> (c) (1) Except as provided in paragraph (2) of this subsection, if energy action is transmitted to the Houses of Congress, such action shall take effect at the end of the first period of 15 calendar days of

continuous session of Congress after the date on which such action is transmitted to such Houses, unless between the date of transmittal and the end of such 15-day period, either House passes a resolution stating in substance that such House does not favor such action.

(2) An energy action described in paragraph (1) may take effect prior to the expiration of the 15-calendar-day period after the date on which such action is transmitted, if each House of Congress approves a resolution affirmatively stating in substance that such House does not object to such action.

(d) For the purpose of subsection (c) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 15-calendar-day period.

(e) Under provisions contained in an energy action, a provision of such an action may take effect on a date later than the date on which such action otherwise takes effect pursuant to the provisions of this section.

(f) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in

the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress described in subparagraph (A) or (B) of this paragraph.

(A) A resolution the matter after the resolving clause of which is as follows: "That the ———— does not object to the energy action numbered ———— submitted to the Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one energy action.

(B) A resolution the matter after the resolving clause of which is as follows: "That the ———— does not favor the energy action numbered ———— transmitted to Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one energy action.

(3) A resolution once introduced with respect to an energy action shall immediately be referred to a committee (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to an energy action has been referred has not reported it at the end of 5 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of any other resolution with respect to such energy action which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same energy action), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same energy action.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable.

An amendment to, or a motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to; except that it shall be in order—

(i) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(A) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(B) of this subsection with respect to the same such action, or

(ii) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(B) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(A) of this subsection with respect to the same such action.

The amendments described in clauses (i) and (ii) of this subparagraph shall not be amendable.

(6)(A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate.

(7) Notwithstanding any of the provisions of this subsection, if a House has approved a resolution with respect to an energy action, then it shall not be in order to consider in that House any other resolution with respect to the same such action.

Sec. 552. (a) Any contingency plan transmitted to the Congress pursuant to section 201(a)(1) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(b) No such contingency plan may be considered approved for purposes of section 201(a)(2) of this Act unless between the date of transmittal and the

end of the first period of 60 calendar days of continuous session of Congress after the date on which such action is transmitted to such House, each House of Congress passes a resolution described in subsection (d) (2).

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-calendar-day period.

(d) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress the matter after the resolving clauses of which is as follows: "That the ———— approves the contingency plan numbered ———— submitted to the Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a reso-

lution which specifies more than one contingency plan.

(3) A resolution once introduced with respect to a contingency plan shall immediately be referred to a committee (and all resolutions with respect to the same contingency plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to a contingency plan has been referred has not reported it at the end of 20 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration of any other resolution with respect to such contingency plan which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same contingency plan), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same contingency plan.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed

to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the notion [sic] shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(6) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedures relating to a resolution shall be decided without debate.

89 Stat. 965-969, 42 U.S.C. 6421, 6422.

The EPCA in Title IV, Part A amended the EPAA to provide authority and mandatory early adoption by the President of described amendments to the existing regulations on pricing policies adopted pursuant to § 4(a) of the EPAA, and for needed amendments of the regulations under EPAA, at six months intervals. The amendments to the EPAA in Title IV, Part A of the EPCA also required and authorized the President to submit to Congress on February 15, 1977 a report containing an analysis of the impact of any such amendments to regu-

lations on the National economy and on supplies of crude oil, residual fuel oil and refined petroleum products; and authorized the President to submit any amended regulations that provided for continuation, modification of certain adjustments in the mandatory regulations authorized by § 4(a) of the EPAA as amended. Each of the mandatory and permissive amended regulations proposed by the President was expressly made subject to the "one-House" veto provisions of § 551 of the EPCA.

Provision was made for the expiration of all authorities, including standby authorities, regulations and orders granted by the EPCA or EPAA at midnight, June 30, 1985, with a minor savings clause for undetermined specified pending matters.

F. *The Two Exercises of the One-House Veto in July 1975*

On July 22, 1975 and on July 30, 1975 the House of Representatives, purporting to act under the "one-House" veto provision of § 4(g)(2) of the EPAA, adopted resolutions of disapproval of the plans of the President to exempt crude oil from mandatory control and pricing regulations. The first proposal of the President to be disapproved was for phased decontrol of crude oil over a time span of 30 months. This proposal of the President was disapproved by House Resolution No. 605 adopted July 22, 1975. 121 Cong. Rec. 23960-23984 (July 22, 1975). The veto is described in 40 Fed. Reg. 31741 (1975).

The second plan of the President was for phased decontrol of crude oil over a period of 39 months, with phased small price increases before the 1976 elections, and larger increases thereafter. This plan was disapproved by the House Resolution No. 641 adopted July 30, 1975. 121 Cong. Rec. 25870-25882 (July 30, 1975). The veto is described in 40 Fed. Reg. 34161 (1975). The facts concerning these actions of the House and the

President are briefly and accurately summarized from official records in Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes* (Bruff and Gellhorn), 90 *Harvard Law Review* 1369 at pages 1390-1393 (1977).

The parties disagree whether the two plans proposed by the President were in substance authorized by the EPAA because the time spans of phased decontrol in each exceeded 90 days.

In 1975 the controversy between the President and Congress over decontrol of crude oil and other petroleum products was settled by passage of the EPCA by the Congress and approval thereof by the President, effective December 22, 1975.

I

Standing

In the unique circumstances of these cases, in which plaintiffs (and some intervenors) challenge the Constitutionality of the EPAA, the EPCA, all or some of the mandatory regulations authorized thereby, and, impliedly, the limited jurisdiction of this Temporary Emergency Court of Appeals of the United States, we conclude that the standing requirement is met. *Chadha* case, *supra*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d at pages 334, 335 (1983); *Dyke* case, *supra*, —— F.2d —— (TECA 1984).

The natures of the crude oil, natural gas liquids and other petroleum products of plaintiffs, subject to the challenged statutes and regulations under review do not limit the conclusions of law herein, which extend to all provisions of the EPAA, the EPCA and regulations authorized thereby.

Because of the unique circumstances, and the limited issues in these cases, the conclusions of law hereof are intended to apply only to the issues arising in these

actions under the EPAA, the EPCA and regulations authorized thereby.

In the *Dyke* case, *supra*, this Court held that the appellant and cross-appellee Gulf Oil Corporation had standing to challenge the subject matter jurisdiction of this Court on the contention that "[t]he applicable statutes granting jurisdiction to this Court contain inseverable and unconstitutional legislative veto provisions, the legislation is void and this Court has no jurisdiction over the cross-appeal" of the *Dyke* case, *supra*. We approve the holding of the *Dyke* case, *supra*, on this issue of standing, and conclude further that plaintiffs in these cases have standing to challenge the Constitutionality of the asserted exercises of the "one-House" veto and the authorizations therefor, under the EPAA, the EPCA and the validity of the regulations authorized thereby.

II

The Ruling of the Chadha Case Should Not Be Applied Retroactively To Invalidate All or Any Part or Parts of the EPAA, the EPCA, or the Regulations Authorized Thereby

The primary issue to be decided in these actions is whether the recent ruling of the Supreme Court of the United States in *Immigration and Naturalization Service v. Chadha*, *supra*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), should be applied retroactively to invalidate all or any part or parts of the EPAA, the EPCA or regulations authorized thereby. If this issue is decided against retroactive application of the ruling in the *Chadha* case, all other secondary contentions of the parties based on the ruling of the *Chadha* case are foreclosed. We conclude that, under controlling decisions of the United States Supreme Court, the ruling of the *Chadha* case should not be applied retroactively to all

or any part or parts of the EPAA, the EPCA (including the "one-House" veto provisions thereof), and the regulations authorized thereby. The reasons for this conclusion follow.

The controlling recent decisions of the Supreme Court on the issue of retroactivity in these cases are *Chevron Oil Co. v. Huson* (*Chevron*), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), and *Northern Pipeline Co. v. Marathon Pipe Line* (*Northern Pipeline*), 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). A summary of the considerations properly bearing on the issue of retroactivity enunciated in the *Chevron* case, *supra*, and in the ruling against retroactivity in the *Northern Pipeline* case, *supra*, are contained in the following quotation from the *Northern Pipeline* case, *supra*:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 (1976 ed., Supp. IV) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act. Our decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, id., at 106, 30 L.Ed.2d 296, 92 S.Ct. 349; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, id., at 107, 30 L.Ed.2d 296, 92 S.Ct. 349; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, ibid. In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive ap-

plication would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively. (Footnotes omitted. 458 U.S. at pages 87, 88, 102 S.Ct. at page 2880, 73 L.Ed.2d at pages 625, 626.)

Applying the three considerations summarized and applied in the *Northern Pipeline* case, *supra*, we find from the legislative history, the statutory provisions of the EPAA and EPCA, the regulations, and the judicially noticed administrative history and judicial decisions of this Court that:

1. The holding of the *Chadha* case, *supra*, decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. This finding is supported by the unchallenged findings of the majority and concurring opinions in the *Chadha* case, *supra*, and the findings of many reliable scholarly articles on legal history of which these are examples: Breyer, *The Legislative Veto After Chadha* (Breyer), 72 *Georgetown Law Journal* 785 (1984); and Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* 1369 (1977), noting the Constitutional questions concerning the "one-House" veto based on the separation of powers and bicameralism, and concluding, "whether the legislative veto will founder upon these constitutional objections is unclear." Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* at page 1374.

2. Retrospective operation in these cases of the holding of the *Chadha* case, *supra*, will retard the operation of that holding as surely as retroactive operation of the *Northern Pipeline* holding to the bankruptcy system would have retarded operation of that holding.

3. Retroactive application in these cases of the holding of the *Chadha* case, *supra*, not only could, but

> would produce substantial inequitable results in these and other cases, because of the pervasive, massive statutory and regulatory applications to the National energy industry since 1973 in closed proceedings that might be reopened and in open pending proceedings and uncompleted transactions, that might be questioned and relitigated under a retroactive application. It is no answer to the inequitable results, that could and would result, to support a limited retroactivity that would not apply to closed proceedings and transactions only.

Further, in determining whether in particular circumstances to order retroactive application of a Constitutional rule of law, recently announced by the judiciary, a foremost criterion is the purpose of the newly announced rule, and whether retroactive application will further or retard its operation. The purpose of the new rule in the *Chadha* case, *supra*, holding a "one-House" veto unconstitutional was stated in the words of the Supreme Court, as follows:

> Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and present-

ment to the President. (Footnotes omitted. 462 U.S. at page —, 103 S.Ct. at page 2787, 77 L.Ed.2d at pages 348, 349.)

The "one-House" veto was an unconstitutional legislative device that first appeared in federal legislation in 1932 and proliferated in numbers through 1982. The purpose of the *Chadha* case was to prevent the continued use of that legislative veto device. Breyer, *supra*, 72 *Georgetown Law Journal* 785; *Severability of Legislative Veto Provisions: A Policy Analysis* (Note), 97 *Harvard Law Review* 1182 (1984). No retroactive application of the rule of the *Chadha* case to the EPAA, the EPCA or regulations authorized thereby is necessary or desirable to further that purpose. That purpose can be fully achieved without retroactive application of the rule of the *Chadha* case to the EPAA or EPCA or the regulations authorized thereby. *Annotation: United States Supreme Court's Views as to Retroactive Effect of Its Own Decisions Announcing New Rules (Annotation)*, 65 L.Ed.2d 1219 at pages 1233, 1235-1237 (1981), and cases cited therein.

From the legislative history of the EPAA and the EPCA we take convincing judicial notice that, prior to the expiration of the mandatory regulations adopted, administered and enforced pursuant to the authority of the EPAA and the EPCA, the reliance placed thereon for ten years before the *Chadha* case extended to every part of the huge essential National and international energy industry, from producers, financiers, refiners, processors, distributors, to direct and indirect purchasers of energy, and the products thereof, including consumers, and extended to nearly every part of the National economy. The resulting effects of the open, as well as closed, large, average and small proceedings and transactions are so numerous that they are uncountable, nearly infinite, immeasurable and irreversible in economic effects and legal rights. The huge numbers of these uncountable

transactions include a nearly infinite number of large, average and small transactions in closed proceedings, and a myriad of irreversible uncompleted transactions and pending proceedings, in which uncountable numbers of parties justifiably obeyed the EPAA, the EPCA and regulations authorized thereby in good faith and without questions. To attempt to apply the rule of the *Chadha* case to the nearly infinite number of closed, or to the huge number of uncompleted transactions and pending proceedings, and effects thereof, would defeat good faith reliance on National laws in these and in future circumstances. See *Annotation*, *supra*, 65 L.Ed.2d 1219 at pages 1237-1239, and cases therein cited.

Retroactive application of the rule of the *Chadha* case, *supra*, would produce substantive inequitable results by affording an opportunity to litigate or repudiate a nearly infinite number of obligations incurred or performed in good faith, and enforced or enforceable in administrative and judicial proceedings under the authority of the EPAA and the EPCA, the effects of which have been transmitted for more than ten years throughout the National economy. Retroactive application of the rule would cause substantive inequitable results to uncountable parties, and would impose substantial and impossible burdens on the administration of justice, which would be confronted with a nearly uncountable and immeasurable number of claims of a myriad of parties. To reverse the previously declared obligations imposed by the terms of the EPAA, the EPCA and the pervasive mandatory regulations authorized thereby would be impossible. Even if the rule of the *Chadha* case were retroactive only to pending or open proceedings, tasks impossible to perform would be imposed on the administration of justice.

III

Alternate Conclusions of Law If the Rule of The Chadha Case Is Held To Be Retroactive

If the *Chadha* case, *supra*, is ultimately held to be retroactive in application to the EPAA and the EPCA, it will be necessary to determine whether the "one-House" veto provisions thereof are severable from the remainder of those Acts. So we make the following alternative conclusions on severability.

Severability of the One-House Veto Provisions of the EPAA and the EPCA.

Acting on a challenge to the subject matter jurisdiction of this Court, based on the contention that the ruling of the *Chadha* case, *supra*, invalidates the whole of the EPAA and the EPCA, this Court has held in a convincing scholarly and sound opinion by Judge Estes that the "one-House" veto provisions of those Acts are severable. *Gulf Oil Corporation v. Dyke, et al. (Dyke)*, *supra*, —— F.2d ——, (TECA Nos. 9-80, 9-81, April 17, 1984). We follow the ruling of the *Dyke* case and conclude that the "one-House" veto provisions of the EPAA and of the EPCA are severable.

Plaintiffs contend that the ruling of the *Dyke* case did not conclude the question of validity of the regulations authorized by the EPAA and the EPCA. We conclude that the ruling of severability of the *Dyke* case, *supra*, does apply to uphold the validity, on their face, of the regulations authorized by the EPAA and the EPCA. This leaves only the questions whether those regulations are invalid because of additional contentions that they are "tainted" by the "one-House" veto, or rendered invalid because of the two exercises in July 1975 of the "one-House" veto disapproving plans of the President for phased decontrol of crude oil.

We move to rulings on those additional questions.

The Regulations Authorized By the EPAA and the EPCA Are Not Invalid Because of "Taint" by the One-House Veto Provisions.

We conclude that the regulations authorized by the EPAA and the EPCA are not "tainted" because: (1) these regulations were confirmed and extended by the enactment of the EPCA by both Houses of Congress and approved by the President, thereby Constitutionally amending and extending the EPAA and the regulations authorized thereby; (2) the records and papers relied on to prove coercive "taint" arising from presence of the "one-House" veto provisions of the EPAA and the EPCA do not establish any illegal, fraudulent or coercive effect on the President; and (3) the plans of the President to decontrol crude oil, disapproved by the House in July 1975, were not plans or amendments to mandatory regulations authorized by the EPAA.

1. The regulations, about which plaintiffs complain, and the authority for their adoption were confirmed and extended in a Constitutional manner by passage of the EPCA by both Houses of Congress and approval thereof by the President in 1975. This followed formal and informal debate, in and out of Congress, confrontation between the President and Congress, repeated and changing analyses of the relevant experience, and enactment of a new impartial law in a manner expected from the separation of powers of the Legislative and Executive Departments by our Constitution. Compare *Clark v. Valeo*, 559 F.2d 642 (C.A.D.C.), *affirmed*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977). See *Mapco v. Carter*, 573 F.2d 1268 at page 1278 (TECA), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3090, 57 L.Ed.2d 1134 (1978), in which the following applies concerning the enactment of the EPAA and amendment by the EPCA under our Constitutional system:

> In our constitutional tripartite system of government, featuring checks and balances between

and within the three branches, it is rarely the case, if ever the case, that all branches of the government join in a unanimous, clear statement of policy or meaning of a law that all people unanimously understand and interpret exactly the same way. Frequently, the executive, legislative, and judicial branches disagree about laws and policies. One branch of government acting within its constitutional authority sometimes nullifies or restricts action of another branch.

Popular elections are regularly scheduled by the Constitution and laws of the nation and states as opportunities to change laws, policies, and the principal national officers of the legislative and executive branches of the federal government. If the legislative branch declares a clear policy and enacts a law to implement the policy, it may later change that law and policy if it acts within accepted constitutional limitations. The judicial branch may declare actions of the legislative and executive branches unconstitutional, or interpret such actions contrary to contentions of the officers of the executive or legislative branches.

The right claimed by plaintiffs is not consistent with these accepted constitutional principles. Even subjectively, the plaintiffs had no constitutional or other right to assume that the federal government or any branch thereof represented prior to December 1975, or made a policy that the permissible prices of "upper-tier" oil would never be changed or reduced. (Footnote omitted.)

The proper factual and legal conclusions concerning the controversy in 1975 between the President and Congress on decontrol of crude oil were expressed in Bruff and Gellhorn, *supra*, 90 *Harvard Law Review* at page 1392 as follows:

The agency would go no further; it made no more submissions prior to December 1975, when the enactment of the Energy Policy and Conservation Act of 1975 (EPCA) settled the issue by legislation.

2. The many records, articles and papers, including those of the President, prove no unconstitutional coercive "tainting" of the regulations under the EPAA and EPCA. In 1973, the "one-House" veto had existed for over forty years in various forms without producing a judicial finding of coercion beyond speculation. The President from 1973 to 1975 not only was not coerced, he composed and promulgated the challenged regulations through Executive Departments. He confirmed their need in the energy crisis, accepting the Congressional judgment by signing into law the EPAA and the EPCA. We do not believe that any of the cases cited by plaintiffs in support of their contentions are legally controlling, or factually in point on this contention.

3. The plans of the President to decontrol crude oil disapproved by the House in July 1975 were not authorized amendments of the regulations under the EPAA because they were each effective for over 90 days, and both proposed plans of the President extended beyond the original expiration date of the EPAA. As such they could not be made effective without further legislation enacted by both Houses of Congress and signed by the President or passed over his veto. See § 4(g)(2), quoted above, providing that proposals of the President to exempt oil or a product by amendment to a mandatory regulation shall be "for a period of not more than ninety days."

FINAL CONCLUSIONS OF LAW

We conclude that the ruling of the *Chadha* case, *supra*, that the "one-House" veto is unconstitutional should not be applied retroactively to the EPAA, the EPCA and to regulations authorized thereby.

In the alternative, we conclude that the "one-House" veto provisions of the EPAA and the EPCA are severable.

Further, in the alternative, we conclude that the regulations authorized by the EPAA and the EPCA are not tainted, coerced and rendered invalid by the "one-House" veto of the EPAA and the EPCA or of either of them.

Further, in the alternative, we conclude that the two proposed plans of the President in 1975 to decontrol crude oil, vetoed by the House of Representatives were not authorized by the EPAA and cannot be retroactively enforced.

Further, as a result of the foregoing conclusions we conclude that neither the above described action (consolidated) in the Northern District of Texas nor the above described actions in the District of Kansas should be dismissed for lack of subject matter jurisdiction because of the ruling in the *Chadha* case, *supra*, that the "one-House" vetoes in the EPAA and EPCA are unconstitutional. A judgment on a separate page is attached.

JUDGMENT

For the reasons stated in Findings of Fact and Conclusions of Law filed herewith, it is

ORDERED AND ADJUDGED that the Emergency Petroleum Allocation Act of 1973, the Energy Policy and Conservation Act of 1975, except possibly the "one-House" veto provisions thereof, and all regulations authorized and adopted thereunder, are not affected or rendered invalid in any respect by the ruling that a "one-House" veto is unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

84-188

No. 84-

Office - Supreme Court, U.S.
FILED
AUG 2 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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APPENDIX B

U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Dkt. No. CA-3-75-0836-W (Consolidated)

DORCHESTER GAS PRODUCING COMPANY, *et al.*

v.

DEPARTMENT OF ENERGY, *et al.*,

November 23, 1983, and December 21, 1983

Before Woodward, Judge.

Judgment has not been entered in this case but a memorandum opinion was filed on June 24, 1983. Various motions have since been filed by the plaintiffs. The court's opinion of June 24th is referred to and adopted as a part of this memorandum order except to the extent that it may be modified or changed herein. All outstanding motions will be disposed of by this memorandum order.

Briefly, the plaintiffs in this case seek a declaratory judgment which would in effect nullify certain regulations and interpretations of the defendant and its predecessor agencies and the defendants pray for a declaratory judgment upholding these same regulations and interpretations.

BACKGROUND

Under the authority of the Emergency Petroleum Allocation Act (EPAA) 15 U.S.C. §§ 751 *et seq.*, the FEA

promulgated Subpart E which controlled the price refiners could charge for certain petroleum products, including NGLs. Natural gas processors were held to be "refiners" and thus subject to Subpart E. *National Helium Corp. v. FEA*, 569 F.2d 1137, 1145 (TECA 1977). The Subpart E regulations, however, were better suited for crude oil refiners, and in 1974 the FEA proposed Subpart K regulations specifically applicable to natural gas processors. Subpart K became effective January 1, 1975.

Both parties (by cross motions for summary judgment) seek to have their methods for calculating the increased costs of natural gas from which NGLs are extracted declared reasonable and the methods of the opposing party declared unreasonable.

In its previous memorandum, the court essentially held that the regulations and interpretations of the Department of Energy (DOE) were proper and, with the exception of the ethane exclusion, the court denied plaintiff's motion for summary judgment and granted the cross motion for summary judgment filed by the defendant. The various motions subsequently filed by plaintiffs generally assert the following:

> (1) Though the court held the transfer-pricing method unreasonable under Subpart E, given the ambiguity of the regulation, plaintiffs' alternative "incremental" method should be held reasonable.
>
> (2) Under the recent Supreme Court decision the promulgation of Subpart K was arbitrary and capricious since DOE failed to consider fixed-quantity contracts.
>
> (3) The court misread or overlooked various agency interpretations.
>
> (4) The inclusion of the fixed-quantity contract price in the weighted average cost of shrinkage is an unreasonable interpretation of Subpart K in that

there was no revenue loss attributable to the fixed-quantity contracts.

(5) The underlying Acts, the EPAA and EPCA, are invalid (under the *Chadha* decision) because they both contain one-house veto provisions.

Because this case covers two distinct regulatory periods, it is necessary to briefly outline the methods actually used by the plaintiffs during the relevant periods. Subpart E was in effect from late 1973 through 1974 and Subpart K became effective January 1, 1975.

TEXACO

During Subpart E period and until 1976, Texaco used a transfer pricing method of calculating increased costs. During 1976 and early 1977, Texaco used the weighted average method of calculating cost of shrinkage now advocated by DOE. During this latest period, Texaco computed the weighted average by using the sale price for *all contracts* from the sale of gas from its processing plant, including fixed-quantity contracts and contracts for the sale of surplus gas.[1] In May 1977, Texaco began using its so-called "incremental method"; that is, Texaco calculated shrinkage costs based on surplus contract prices, excluding from the calculation the price received under the fixed-quantity contracts. Affidavit of B.B. Fox in Support of Texaco Inc.'s Motion for New Trial, page 2. In December 1978, Texaco refiled to claim increased costs for the period prior to May 1977 to reflect costs computed pursuant to the incremental method.[2] Counsel for Texaco at the October 25, 1983 hearing stated that the refilings were "accepted by DOE."

---

[1] Argument of counsel for Texaco at the October 25, 1983 hearing in Abilene, Texas.

[2] Counsel for Texaco and the letter from Texaco's Comptroller to Mr. Richard Anderfuren state that Texaco refiled in December 1978. The Affidavit of B.B. Fox, however, states that Texaco refiled in October 1979.

EXXON

Plaintiff Exxon passed through no increased costs for NGLs during August, September, and October 1973. During the period November 1973 through March 1974, Exxon computed increased costs under a formula permitted for old crude oil. *See* Exxon's Supplemental Answers to Defendant's First Set of Consolidated Interrogatories and Request for Production of Documents filed April 1, 1982. In April 1974, Exxon again changed methods and until December 1974, utilized a transfer pricing method, based on its historical system of accounting. This formula utilized the Exxon posted prices for propane and motor gasoline. Exxon re-filed, seeking to make this transfer pricing method effective as of November 1973. *Id.* During Subpart K, Exxon employed its incremental method of calculating shrinkage.

MOBIL

Plaintiff Mobil initially challenged the regulatory control of NGLs under Subpart E, lost this suit, and then refiled and used what is in effect the incremental method. *Mobil Oil Corp. v. F.E.A.*, 566 F.2d 87 (TECA 1977). The court in *Mobil* affirmed the holding of the district court that the FEA has authority "to regulate the allocation and pricing of all liquid petroleum products recovered from the 'wet' natural gas streams, including condensate, natural gas liquids and natural gas liquid products recovered at gas processing plants (propane, butane, and natural gasoline except ethane)." 566 F.2d 87 (TECA 1977). Mobil, during both the Subparts E and K periods, sold processed gas under five fixed volume contracts and sold the remainder under a sixth contract to Channel Industries. The parties disagree over the characterization of the Channel Industries contract as a "surplus" contract. The Channel contract did in fact contain a maximum volume limit term, but that limit was exceeded only once. In calculating its increased

costs, Mobil used only the prices received from the Channel Industries contract and ignored the fixed-quantity contracts.

REFILING PROVISION

Texaco and Exxon claim the above to be the methods they "actually used" by virtue of resubmitting monthly reports.

Section 212.126(b) of the DOE Mandatory Petroleum Price Regulations (10 C.F.R. § 212.126(b), 39 Fed. Reg. 1961, January 15, 1974) requires that refiners

> . . . shall prepare and file with the FEO periodic reports in accordance with forms and instructions issued by FEO. Each refiner shall submit its calculations under the formulas of § 212.83 in accordance with the forms and instructions issued by FEO.

Form FEO-96, FEA/DOE P110 and EJA-14 were issued pursuant to this provision. Both forms P110 and FEO-96 contain the question, "Is this a resubmission?" and a box to check either "yes" or "no." Neither the forms nor the regulations define the purpose or scope of the resubmission procedure.[3] The forms provided no time limit for resubmission.

Effective May 1, 1979, the DOE amended § 212.126 to limit refiling to one year after the original filing except where expressly authorized by DOE or where written permission to resubmit or refile is granted for good cause shown. 44 Fed. Reg. 14534, March 13, 1979, 10 C.F.R. § 212.126(d). DOE stated that the purpose of the allocation reports is to assure compliance with § 212.83 (Subpart E).

> "We recognize that these reports sometimes require the use of estimated data and that in dealing

[3] Form P110-M-1 Specific Instructions states: "Item (7)—Is this a resubmission? Answer 'Yes' if you are supplying additional information or are resubmitting a report. In either case, the form must be completed in its entirety."

with such calculations some good faith errors are unavoidable. However, in order to more effectively stabilize cost allocation data for the purpose of finalizing compliance actions or audits, and to prevent possible circumvention of the regulations by inappropriate use of the resubmission procedure, it is necessary to issue explicit regulatory provisions regarding the time for refiling cost allocation reports by refiners and the types of revisions which may be made on the forms." 44 Fed. Reg. 14535 March 13, 1979.

Though such language might appear to preclude the use made by Texaco and Exxon of the refiling procedures, the interpretation of the DOE apparently concedes that a resubmission may be made to reflect the refiner's new methodology. When initially proposed, the amendments contained a sixty-day limit on refiling. Comments received in response convinced DOE to allow a full year to refile. One of the criticisms received was that "any increased allowable costs in a prior period due to retroactive DOE interpretations, rulings and clarification and court decisions could not be automatically reported by a unilateral refiling of an amended cost allocation form." Thus, the agency contemplated the use of the resubmission procedure to retroactively adopt a new method.

Further, the FEA stated that "While such resubmissions and refilings will be automatically accepted, the adjusted data submitted will be subject to verification and approval." *Id.*

SUBPARTS E AND K

The Mandatory Petroleum Pricing Regulations basically froze the prices of all refined petroleum products at their May 15, 1973 levels. The regulations specified the permissible price increases. Subpart E applied to the sale of refined products by "refiners."

§ 212.81 Applicability

. . . this subpart applies to each sale of a covered product which is purchased or refined by a refiner.

§ 212.82 Price Rule

(a) *Rule.* A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

(b) *Price increases.* A price in excess of the base price of an item in a product line may be charged only to recover on a dollar-for-dollar basis *those net increases in allowable costs* that have been incurred with respect to the product line. . . .

(2) . . . 'Allowable costs' under this section means *non-product* costs attributable to refining operations. . . . (emphasis added)

The "base price" is defined in § 212.82(f) as the May 1973 price plus "increased product costs" incurred between the month of measurement and the month of May 1973.[4]

§ 212.83 prescribes the method of computing the base price pursuant to § 212.82(f). This section, however, pertains to the pricing of petroleum products produced from *crude* oil, as opposed to natural gas.

§ 212.83 Allocation of refiner's increased product costs.

(b) *Definitions.* For purposes of this section— 'cost of petroleum product' means (1) for purposes

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[4] The May 1973 ceiling price is the weighted average sales price on May 15, 1973; subsection (f) states that "In computing the base price, a firm may not exclude any temporary special sale, deal or allowances in effect on May 15, 1973." In other words, the regulations warned the refiners not to arbitrarily or unjustifiably maximize their base price calculation.

> of domestic petroleum products *other than crude petroleum*, the *purchase price* including transportation costs. . . .
>
> 'Increased product costs' are defined as the increase in the total cost of crude (between the month of measurement and May 1973) *plus* the increased cost of petroleum product.

Under Subpart E, the costs refiners (or processors) were allowed to pass through were based on their actual cost of raw materials and refining operation costs. Where crude oil was a raw material used in producing a refined product, the regulations allowed the price to increase considerably. The price of crude was permitted to rise to this extent because the market price of oil was rising so astronomically.[5]

The price of refined products produced from natural gas, on the other hand, was not allowed to rise as dramatically; rather, they were effectively limited to their May 1973 prices. *See National Helium Corp. v. FEA*, 569 F.2d 1137, 1143 (TECA 1977), *citing* Emergency Amendment to Special Propane Rule, 39 Fed. Reg. 28608. The price of a petroleum product therefore depended in part upon the raw material from which it was produced.

The plaintiffs first argue that, analogizing natural gas to crude oil, their transfer-pricing is a reasonable method under Subpart E.

This court has already found the transfer method unreasonable. (Memorandum Opinion, page 17.) As stated before (and as indicated by the regulations cited above), the intra-firm transfer price was allowed *only* for *imported* crude. Further, the Emergency Amendment to the

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[5] It was in fact the oil embargo that led to the mandatory allocation and price control of petroleum products in the first place. The purpose was to keep the prices stable without stifling production.

Special Propane Rule explicitly prohibited the calculation of increased costs of NGLs based on acquisition of natural gas from an affiliated entity. § 212.83(c)(1)(iii). The intra-firm transfer price utilized by Exxon referred to the "posted" price of crude. Though Exxon self-servingly argues that such a reference price results in a parity of pricing between products produced from gas and those produced from crude, the fact is that crude prices were rising while natural gas prices were not. Thus Exxon was attributing increased product costs to NGLs which, contrary to the scheme of Subpart E, had no basis in reality.

Since Subpart E was geared primarily to crude oil refiners, many gas processors were left with 1973 prices. If the processor bought the natural gas he processed, the increased cost based on that *purchase price* could be passed through under Subpart E as an increased product cost. Processors who processed their own natural gas, however, were denied inter-affiliate transfer prices, and could only pass through certain increased costs of production as increased non-product costs. Since they did not purchase raw materials, they incurred no actual increased product costs, but rather were effectively limited to the increased costs of producing the natural gas. Since the cost of producing natural gas did not increase significantly during the E period, their prices were effectively frozen at or near 1973 prices.

The FEA recognized the lack of attention given gas processors in the regulations:

> ". . . while natural gas liquids are subject to the FEA's mandatory price regulations, increased costs associated with the production or processing of natural gas liquids have generally been minimal and there has been no precise method for passing any increased costs through in the present regulations. The FEA is aware of the need for improving its regulations in this area and will be proposing

> amendments for this purpose in the immediate future. In the meantime, the amount of increased product costs which may be passed through by refiners is subject to the general principle that such increased costs are limited to those cost increases which reflect payment of lawful prices." 39 Fed. Reg. 28608, August 9, 1974.

Thus the issue is whether the plaintiffs' "incremental" method was a reasonable one under Subpart E in that it reflected the payment of lawful prices. The FEA permitted the Subpart K shrinkage formula to be applied retroactively to the E period. 40 Fed. Reg. 10824, September 4, 1975. The plaintiffs' incremental method will therefore be discussed in the context of Subpart K, but the reasonability of the method must be judged in terms of the two distinct regulatory premises of Subpart E and Subpart K. This court rejected the plaintiffs' incremental method during the K period in the original Memorandum Opinion. The FEA directly addressed the problem of NGL pricing and the natural gas/crude oil pricing disparity by enacting Subpart K. While Subpart E basically allowed the increased price *paid* by the processor or refiner for the raw material used in processing, Subpart K calculated increased costs based on what the processed gas *would have been sold for* by the processor had it not been lost in the extracting process. Under Subpart K, what the gas *would* have been sold for is measured by the contracts in effect.

Subpart E and Subpart K attack the problem of determining actual increased natural gas (product) costs from two fundamentally different directions. Subpart E sought to base the price of the product on the *cost* of the natural gas to the processor; Subpart K sought to base the price on the price for which the processor would have *sold* that gas (under existing contracts) had it not been used in processing NGLs.

In that the purpose of the pricing regulations was (1) incentive for production of NGLs (2) minimization of prices, Subpart K's opportunity methodology struck the balance more in favor of the incentive to produce. As set out in the original Memorandum Opinion, the relevant provisions of Subpart K are sections 162 and 167. 10 C.F.R. § 212.162 defines "cost of shrinkage" as:

> [t]he reduction in selling price per thousand cubic feet (MCF) of natural gas processed, which is attributable to the reduction in volume or BTU value of the natural gas resulting from the extraction of natural gas liquids, as determined pursuant to the *contracts in effect at the time* for which cost of natural gas shrinkage is being measured, and under which the *processed* natural gas is *sold.* (emphasis added)

10 C.F.R. § 212.167(b) defines "Increased product costs" as

> (3) the difference between the *weighted average cost* of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the month of May 1973, and the *weighted average cost* of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the current month, multiplied by the number of thousand cubic feet (MCF's) of natural gas processed in the current month. (emphasis added)

As DOE contends, and the court agreed as the proper interpretation, Subpart K requires the processor to weight average *all* contracts in effect—both fixed-quantity and surplus—for the sale of residue gas to calculate the loss resulting from shrinkage. The plaintiffs' incremental method would exclude the lower-priced fixed-quantity contracts from that weighted average calculation.

With respect to Subpart E, the use of an opportunity cost method which excludes the fixed-quantity price, is

unreasonable. Subpart E sought to allow the pass-through of *actual* increased *costs;* the FEA allowed a reasonable method which would, in effect, reflect the payment received by the processor in the sale of the processed gas. The costs at which the processor would have sold the gas used in processing, only reasonably reflects *actual* costs if the fixed-quantity contract price term is included. An essential fact that the plaintiffs refused to concede at the October 25th hearing and glossed-over in their briefs, is that one of the two objectives of the EPAA was the minimization of the price of petroleum products. To use only higher price surplus contract terms in calculating the increase cost of natural gas circumvents price control mandated by Subpart E.

With respect to Subpart K, plaintiffs' incremental method is also unreasonable.[6] The Preamble to subpart K states that "The cost of shrinkage shall be computed based upon the *contractual terms in effect* for the sale of natural gas *during the time period for which shrinkage cost is being measured.*" 39 Fed. Reg. 44409, December 24, 1974 (emphasis added). Clearly, the exclusion of the fixed-quantity contract price was not contemplated by the regulations, but rather subverts their purpose.

The plaintiffs argue that since there is no loss of revenue resulting from the extraction of NGLs under *satisfied* fixed-quantity contracts, Subpart K contemplates, or at least permits, the exclusion of fixed-quantity contracts. *See e.g.* Exxon's Reply to Defendants' Response, page 4. This argument, however, proves too much. When there are outstanding contracts—fixed-quantity or otherwise—and a stream of gas enters a plant for processing, part of the BTU content that could conceivably have gone toward satisfaction of those existing contracts is lost. In other words, the loss of revenues from process-

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[6] Plaintiffs' argument was rejected in the original Memorandum Opinion, pages 5-7.

ing actually pertains to *all* the existing contracts. Plaintiffs' theoretical attribution of the loss of revenue due to processing exclusively to surplus contracts is spurious; it is merely a rationalization for charging the highest price possible. Plaintiffs obviously would not realize as much shrinkage loss by using their long-term low price contracts as they would on their more current contract; that is not a phenomenal or unique situation; nor is it a valid excuse to evade the regulations and exclude fixed-quantity contracts from calculating shrinkage.

Further, plaintiffs argue that the shrinkage calculation should include contracts under which the liquids would have been sold but for processing, but exclude contracts under which the liquids would not have been sold. Fixed-quantity contracts should, according to plaintiffs, therefore be excluded because *no more than the committed quantity would have been sold thereunder* by any rational processor. This argument presumes that the regulations intend to allow processors to recoup increased costs based on prices that could presently be contracted for gas. The fact that Exxon would sell "no more than the committed quantity" is totally irrelevant. Exxon is presumed by the regulations to sell only the fixed amount at the contract price; that is why the average of all such contract prices are *weighted.* The price which Exxon actually received under the fixed-quantity contract, though not a price that Exxon would necssarily contract for at the time of measurement, is none the less relevant for calculating loss of revenues due to shrinkage. The dollar-for-dollar pass through entails actual, not potential, prices.

The plaintiffs finally make a construction argument with respect to Subpart K. Plaintiffs argue that since § 162 does not mention "weighted average", that term, when used in § 167 pertains only to those situations where one entity operates several gas plants and cal-

culates a single cost of shrinkage. Ruling 1973-18 directly refutes such a strained reading of the regulations:

> The purpose of requiring a 'weighted average' cost comparison is to provide a method by which firms which have chosen, pursuant to § 212.167(b), to aggregate the total amount of increased product costs respecting volumes of natural gas subject to differing sales contracts which are processed in *one* or more plants, may calculate a single amount representing the increased costs of natural gas shrinkage for the aggregate of volumes of natural gas processed. Accordingly, the above formula provide the acceptable methods for the computation of a 'weighted average cost of natural gas shrinkage.' Where the increased costs associated with several volumes of processed natural gas have been aggregated, the residue price which is used to determine the cost of natural gas shrinkage is a *weighted average of all the contract price terms under which the different volumes of processed natural gas are sold.* Ruling 1975-18, 40 Fed. Reg. at 55863, December 2, 1975 (emphasis added).

Clearly Subpart K should be read as a whole, and should not be arbitrarily segregated into parts which, standing alone, are meaningless.

Mobil, while making the same general argument with respect to the exclusion of the fixed-quantity contract price from the weighted average, also asserts that it should not be judged on the basis of a factual situation different from its own. The regulations in question did not contemplate uniform contractual situations for all gas processors, but rather were premised on the assumption that the contractual situations would be varied. *See* 39 Fed. Reg. 32720, September 10, 1974. The fact that all of the gas processed at Mobil's Old Ocean plant is under contract does not in any way alter the interpretation of the regulations discussed above.

The court finds that the plaintiffs' "incremental method" was unreasonable under both Subpart E and Subpart K, and that the DOE interpretation is reasonable in light of its purpose.

ARBITRARY AND CAPRICIOUS

All plaintiffs take the position that Subpart K, and the procedure used in the promulgating this subpart, constituted arbitrary and capricious action on the part of DOE. The thrust of the argument is that in promulgating Subpart K, DOE failed to take into account the fixed-quantity contracts, and that these contracts are so imperative to the determination of shrinkage costs that the agency's failure to explicity consider them renders the regulations void under *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953 (U.S. June 24, 1983) (hereinafter "*Airbags*"). In the *Airbags* case, the Supreme Court held that the revocation of a safety standard requiring passive restraints in cars arbitrary and capricious. Motor Vehicle Standard 208, promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, required automobile manufacturers to install either of two passive restraint devices: airbags or seatbelts. The industry planned to comply by installing seatbelts in 99% of the cars produced. *Id.* at 4955. The agency later concluded that the seatbelts would not achieve the anticipated safety results because they could be detached, and completely rescinded the regulation. Since the agency itself had previously determined that airbags would achieve the desired results under the Motor Vehicle Safety Act, the Court held that the rescission of Standard 208 without even considering the airbag option was arbitrary and capricious. *Id.* at 4957, 4958.

When Subpart K was promulgated, however, the DOE considered the analogous relevant factors. As stated in

the Preamble, ". . . there is no single ideal solution to the regulation of natural gas liquid prices, and the regulations adopted by the FEA today are a necessary compromise among the conflicting considerations which must be taken into account. . . . [T]he fundamental objective is to permit prices that will be as low as reasonably possible without adversely affecting the availability of the product." 39 Fed. Reg. 4408, December 24, 1974. To achieve this dual-objective, the agency considered several approaches: price ceilings, profit margin limitations, and a flexible price based on varying costs of gas and crude oil. *Id.* These are the crucial considerations. Fixed-quantity contracts are not to Subpart K as airbags are to Standard 208. Fixed-quantity contracts are only one aspect of one of these alternative price control alternatives. The Supreme Court made this clear in *Airbags* by stating that ". . . a court may not impose additional procedural requirements upon an agency . . . Nor do we broadly require an agency to consider all policy alternatives in reaching a decision. It is true that a rulemaking cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been." *Id.* at 4958, *citing Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1977). In this case, the plaintiffs' contention would impose insurmountable requirements upon DOE. Requiring consideration of each specific contract in effect would force executive agencies to foresee every conceivable contingency and would effectively preclude them from rulemaking. The court finds that the agency did not act arbitrarily or capriciously in the promulgation of Subpart K.

ONE-HOUSE VETO

Finally, in a motion for summary judgment, Exxon asserts that the Acts in question, the EPAA and EPCA,

15 U.S.C. §§ 751, *et seq.*, are invalid because they contained a one-house veto provision, declared unconstitutional by the Supreme Court in *Immigration and Naturalization Service v. Chadha*, —— U.S. ——, 51 U.S.L.W. 4907 (June 23, 1983).[6a]

In the *Chadha* case, the statute in question contained a severability clause, thus only the veto provision itself was invalidated. Further in *Chadha*, the veto provision was actually exercised to the detriment of the plaintiff. The Supreme Court emphasized the fact that *exercise* of the veto was a legislative function, and thus violated Article I.[7] In this case, however, no veto has been exercised over the regulations in question. A substantial constitutional question exists as to whether a retained veto provision, though unexercised, falls under the *Chadha* decision. The fact that a district court has held such a retained veto provision unconstitutional makes the issue no less substantial. *EEOC v. Allstate Insurance Co.*, No. J82-0186(B) (S.D. Miss. September 9, 1983). The far-reaching implications of invalidating statutes which merely contain one-house veto provisions are hardly settled by this Mississippi court opinion. Further, in this case, Congress does not have the power to veto the regulations in question. Whether Exxon has standing to raise the issue is thus closely intertwined with the constitutional question. Both the constitutionality of the Acts and the standing question depend on the limits the Supreme Court places upon the *Chadha* decision.

[6a] The veto provisions in the EPAA and EPCA pertained only to certain provisions giving the President decontrol authority.

[7] "Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially Legislative in purpose and effect . . . The one-House veto operated in this case to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status. *Id.* at 4916 (emphasis supplied).

Therefore, pursuant to 12 U.S.C. § 1904 note (§ 211), the substantial constitutional issues raised by Exxon's motion for summary judgment are certified to the Temporary Emergency Court of Appeals.

CONCLUSION

For the reasons stated above, the court finds that:

1. Both the plaintiffs' intra-firm transfer price method and alternative incremental method are unreasonable under Subpart E.

2. DOE's interpretation of Subpart K is reasonable in light of the purpose of Subpart K.

3. The plaintiffs' exclusion of fixed-quantity contracts from the calculation of the weighted-average cost of shrinkage is unreasonable under Subparts E and K. In short, the weighted average cost of shrinkage reflects what processors were receiving under contracts in effect for their processed gas; and under either Subpart E or Subpart K, the exclusion of fixed-quantity contracts overstates what was actually received and is thus contrary to the purposes of the regulations.

4. DOE's promulgation of Subpart K was not arbitrary and capricious.

5. The one-house veto provisions in the EPAA and EPCA present substantial constitutional questions.

6. The court has considered the relevant agency rulings and interpretations and, as discussed in the original Memorandum Opinion, finds that they support rather than refute DOE's position in this case.

7. The material and ultimate facts in this case are not in dispute.

Therefore:

The Motion of Texaco Inc. for a New Trial is denied.

The Motion of Mobil Oil Corporation and Mobil Oil Exploration and Producing Southeast, Inc. for New Trial or in the Alternative for Clarification is denied.

The Motion of Exxon Corporation to Clarify Memorandum Opinion Concerning Subpart E is denied.

The Motion of Exxon Corporation to Vacate Findings of Fact and Conclusions of Law Concerning Subpart K and to Substitute Other Findings of Fact and Conclusions of Law is denied.

The motion of Exxon for Partial Reconsideration in Light of Intervening Supreme Court Opinion and Misapprehension of Parties' Positions is denied.

Exxon's Supplemental Motion for Summary Judgment presents substantial constitutional questions and is certified to the Temporary Emergency Court of Appeals.

In accordance with the Memorandum Opinion issued June 24, 1983, the plaintiff's Motion for Summary Judgment with regard to the ethane exclusion is granted, and the defendants' corresponding motion is denied. The defendant's Motion for Summary Judgment on all other issues is granted, and the plaintiff's motion denied.

The attorneys will confer and submit a judgment in accordance with this order. Such judgment shall include the certification of the constitutional issues to the Temporary Emergency Court of Appeals and shall be submitted to the court for entry on or before December 15, 1983.

The Clerk will furnish a copy hereof to each attorney.

JUDGMENT

(December 21, 1983)

This matter came before the Court on the parties' cross-motions for summary judgment. For the reasons stated in the Court's Memorandum Opinion of June 24,

1983 and its Memorandum Order of November 23, 1983, it is this *21st* day of December, 1983,

ORDERED, ADJUDGED and DECREED that the motion for summary Judgment of the defendant Department of Energy is denied with respect to the validity of the Ethane Exclusion Rule as promulgated on December 24, 1974, 39 Fed. Reg. 44413, 10 C.F.R. § 212.147 subsection (a), and it is granted in all other respects; and it is further provided that this judgment shall not adjudge the validity of any regulations pertaining to the ethane exclusion which were promulgated after December 24, 1974, and this judgment is intended only to rule as invalid the Ethane Exclusion Rule as promulgated on December 24, 1974; and it is further

ORDERED, ADJUDGED and DECREED that the motion for summary judgment of the plaintiffs is denied except with respect to the validity of the same 10 C.F.R. § 212.147 as promulgated on December 24, 1974, 39 Fed. Reg. 44413 subsection (a) and it is granted with respect to that subsection; and it is further

ORDERED that the Joint Amended Complaint of the parties is dismissed with prejudice; and it is further

ORDERED that plaintiffs shall bear their own costs in this lawsuit, and no later than 30 days from the date hereof, the defendant shall recover from plaintiffs its costs to be taxed by the Clerk of the Court.

SUPPLEMENTAL MEMORANDUM

(December 21, 1983)

Plaintiff Texaco claims that it has reserved its estoppel issue based on the Larry White "incremental costing letter." This court, however, has already disposed of the issue. The June 1983 Memorandum Opinion held that the Larry White letter was "in the nature of informal advice by agency employees which [does] not have the

stature of official agency interpretations through DOE's Office of General Counsel and accordingly, are to be accorded little weight for purposes of regulatory interpretation." Memorandum Opinion, p. 7 *citing Pennzoil Co. v. United States Department of Energy*, 680 F.2d 156, 171 (TECA 1982). Plaintiff Texaco again raised the Larry White letter issue in its Motion for New Trial. In that motion and brief, Texaco did not mention its purported reservation of the estoppel issue. This court, in the November 1983 Memorandum Order, specifically denied Texaco's Motion for New Trial. Memorandum Order, p. 19.

The key to the issue is the fact that Texaco could not justifiably rely on agency advice without seeking a formal agency interpretation. This point is made clear in the *Pennzoil* case. *See Pennzoil Co. v. United States Department of Energy* at 179. The estoppel argument was therefore rejected by the court in both opinions.

Plaintiff Texaco further contends that the estoppel issue was not before the court because the defendants' Cross Motion for Summary Judgment, which requested judgment on all issues raised in the plaintiffs' Joint Amended Complaint, was not ever received by plaintiff Texaco. Texaco received the defendants' Brief in Support of their Cross Motion for Summary Judgment on August 9, 1981, yet did not complain about not being served with the motion, and on October 25, 1983, counsel for Texaco appeared at the hearing in Abilene on the pending motions for summary judgment and did not mention the lack of service. Therefore, the judgment to be entered in this case granting the defendants' Motion for Summary Judgment in all but one instance shall be a judgment overruling and denying the estoppel issue as raised by Texaco.

The Clerk will furnish a copy hereof to each attorney.

ORDER CERTIFYING SUBSTANTIAL CONSTITUTIONAL ISSUE TO THE TEMPORARY EMERGENCY COURT OF APPEALS

(December 21, 1983)

Pursuant to section 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, the court hereby certifies to the Temporary Emergency Court of Appeals the following substantial constitutional issue raised by plaintiff Exxon Corporation in its Supplemental Motion for Summary Judgment:

> Whether the Emergency Petroleum Allocation Act of 1973 and the Energy Policy and Conservation Act are unconstitutional under *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983), in that they contain unconstitutional one-house legislative veto provisions that are not severable from the remainder of those statutes, thereby rendering void the regulations promulgated pursuant thereto.

Pursuant to Rule 16 of the Temporary Emergency Court of Appeals, the nature of this cause and the facts on which the certified issue arises are set forth in this Court's Memorandum Opinion and Memorandum Order, which are attached hereto and incorporated herein for purposes of said Rule 16.

The Clerk will furnish a copy hereof to each attorney.

APPENDIX C

UNITED STATES DISTRICT COURT
D. KANSAS

MDL No. 378

IN RE THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION

Sept. 13, 1983

On Motion to Certify Constitutional Issues

Jan. 25, 1984

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Alexander B. Mitchell, Wichita, Kan., Harold E. Kohn, Michael D. Hausfeld, Joseph C. Kohn, Kohn, Savett, Marion & Graf, Philadelphia, Pa., for Nat. Freight, Inc. and Philadelphia Elec. Co.

George G. Olsen, Williams & Jensen, Washington, D.C., for IU Intern. Oil & Gas Inc.

John F. Hayes, Hutchinson, Kan., William G. Riddoch, Houston, Tex., for Shell Oil Co.

James F. Flug, Washington, D.C., for State of Ala., Michigan, California.

Wayne Hundley, Deputy Atty. Gen., Topeka, Kan., Arthur J. Galligan, Washington, D.C., E. Dwight Taylor, Wichita, Kan., for States of Kan., Del., R.I., N.D., Ia., La. and Ala., Mich. and Cal., W.Va.

Alexander B. Mitchell, Wichita, Kan., Jerry S. Cohen, Michael D. Hausfeld, Patricia F. Bak, Washington, D.C., for Independent Motor Gasoline Retailers, see dkt 279 for names of intervenors.

John A. Gibney, Jr., Richmond, Va., for intervenor Commonwealth of Va.

John R. Tarpley, Asst. Atty. Gen., Nashville, Tenn., for State of Tenn.

Richard P. Wilson, Asst. Atty. Gen., Columbia, S.C., for Georgia and South Carolina.

J. Wallace Malley, Jr., Jane Hart Marter, Asst. Attys. Gen., Montpelier, Vt., for State of Vt.

Claude E. Salomon, Deputy Atty. Gen., Div. of Law, Newark, N.J., for State of N.J.

Bernard Nash, Edward G. Modell, Blum & Nash, Washington, D.C., for States of Pa., Nev., Hawaii and Guam.

Jo Anne Sanford, Sp. Deputy Atty. Gen., Steven Bryant, Asst. Atty. Gen., Raleigh, N.C., for North Carolina.

Brad P. Engdahl, St. Paul, Minn., for Minnesota.

Frank J. Huftless, Asst. Atty. Gen., Lincoln, Neb., for Nebraska.

Frank W. Ostrander, Asst. Atty. Gen., Portland, Or., for Oregon.

Eduardo L. Buso, Asst. Atty. Gen., San Juan, P.R., for Puerto Rico.

Richard R. Knoepfel, Chief, Law Div., St. Thomas, U.S. V.I., for Virgin Islands.

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Richard F. Webb, Asst. Atty. Gen., Hartford, Conn., for Connecticut.

Bruce E. Mohl, Asst. Atty. Gen., Concord, N.H., for New Hampshire.

Robert Frank, Asst. Atty. Gen., Augusta, Maine, for Maine.

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Brian Grace, Wichita, Kan., Ralph J. Maynard, Houston, Tex., for Tenneco Oil Co.

John P. Mathis, Catherine C. Wakelyn, Washington, D.C., for Tenneco Oil Co. and Pennzoil Co.

Perry O. Barber, Houston, Tex., for Pennzoil Co.

Kenneth L. Bachman, Jr., Eugene M. Goott, Washington, D.C., Jeanette M. Thomas, Los Angeles, Cal., for Tosco Corp.

Thomas A. Donovan, Pittsburgh, Pa., Robert H. Compton, Kathleen C. Gillmore, Ashland, Ky., for Ashland Oil Inc.

Richard P. Noland, Robert R. Morrow, Monica A. Otte, Washington, D.C., for Texas City Refining Inc.

Brian Grace, Wichita, Kan., Van R. Boyette and Joseph C. Bell, Washington, D.C., for American Petroleum Refiners Ass'n.

Thomas D. Kitch, Wichita, Kan., Pillsbury, Madison & Sutro, San Francisco, Cal., for Chevron U.S.A. Inc.

James P. Zakoura, Kansas City., Kan., Robert L. Gowdy, Kansas City, Mo., for Farmland Industries, Inc.

Alphonse M. Alfano, Robert S. Bassman, Douglas B. Mitchell, Washington, D.C., Will Marson, Topeka, Kan., for Nat. Oil Jobbers Council.

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James F. Flug, Lee Ellen Helfrich, Lobel, Novins & Lamont, Washington, D.C., for State of Wyo., Idaho and Ind.

Frank Baldwin, Deputy Atty. Gen., Indianapolis, Ind., for State of Ind.

E. Dwight Taylor, Hulnick & Taylor, Wichita, Kan., Andrew P. Miller, Arthur J. Galligan, Peter J. Kadzik, Washington, D.C., for State of Utah.

MEMORANDUM AND ORDER OF REFERRAL FOR FACT FINDING TO ADMINISTRATIVE AGENCY

THEIS, District Judge.

Like flies to honey, claimants are quickly drawn by a fund containing over one billion dollars. These claimants have radically differing notions as to how the fund should be distributed, with one factor common to all suggested approaches: each claimant, unsurprisingly, desires a methodology of distribution likely to result in a large percentage of the fund being deposited into said claimant's pockets. Now before the Court is a motion to refer the question of fund distribution to the Department of Energy's Office of Hearing and Appeals (OHA). Some of the parties wholeheartedly endorse this approach, others wholeheartedly oppose it, and others embrace it only as a fall-back position should the Court reject their contentions that the money should go immediately to them. Needless to say, all parties view this motion as extremely important, if the immense effort funneled into the voluminous briefs on this issue are an accurate gauge of the parties' perception of the importance of this motion.

This action is a consolidation of a number of cases brought by oil producers to enjoin the Federal Energy Administration (FEA), now the Department of Energy (DOE), from enforcing Ruling 1974-29, concerning low production oil wells, commonly called "stripper wells." The Court enjoined enforcement of the regulations in question, but ordered the oil producers to deposit into escrow the difference between the stripper well price and the controlled price of crude oil affected by the injunction. As of October 31, 1982, the escrow fund, including interest, contained over one billion dollars.

The issue of the validity of the regulations and Ruling was finally settled in *In Re The Department of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375 (Em.

App. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983), in which the Temporary Emergency Court of Appeals (TECA) reversed this Court's decision and upheld the rulings and regulations as valid. TECA remanded this action to this Court with instructions to enter judgment for DOE, which judgment has been entered. The effect of TECA's decision is to declare the funds deposited in escrow to be overcharges received due to violations of the petroleum pricing regulations. The remaining task is the appropriate dispensation of the escrowed funds—in effect a monumental interpleader action with potential classes and sub-classes.

The DOE has moved the Court to refer the issue of remedy to DOE pursuant to the doctrine of primary jurisdiction. DOE contends that the remedy issues are complex and are within the special competence of the agency. DOE states that the distribution of the various claims will require analysis of the ability of the claimant to pass through increasing costs and the extent to which such costs were actually passed through. DOE also notes that an analysis of the impact of the complex Entitlements Program and of the system of "banks" of increased costs will be required. DOE points out that it has already established a procedural mechanism for considering refund applications and that issues similar to those before the Court are presently being considered in refund actions before OHA. DOE contends that initial consideration by the agency, subject to review by the Court, will be more efficient than the Court conducting the entire factual inquiry itself.

Nearly every premise underlying the DOE's motion to refer has come under attack by other parties, which challenge both DOE's characterization of the remaining inquiry and DOE's competence and fairness to conduct it.

Plaintiff oil producers vigorously oppose the motion to refer. From their perspective, the remaining ques-

tions are mostly legal, not factual. They contend referral would, by implication, decide these legal issues and that the result would be contrary to what they view as controlling legal precedent. The principal legal contention advanced by producers is that it is improper to attempt to determine the actual damages beyond the refiner stage of distribution. In other words, the Court should not consider whether any overcharges were passed through by refiners to marketers and consumers. The basis of this contention is a line of precedent in antitrust law rejecting pass through theories and limiting recovery to first purchasers, with certain limited exceptions. *Hanover Shoe, Inc. v. United Machine Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L.Ed.2d 1231 (1968); and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). This approach has been applied to private enforcement actions brought under Section 210 of the Economic Stabilization Act. *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 609 F.2d 497 (Em. App. 1979). Producers also contend that the OHA has failed to demonstrate either expertise or efficiency in its handling of refund claims. Producers further claim that OHA is not autonomous and has prejudiced the issues in this case.

Finally, producers claim that referral is not appropriate because the pending issues are of the type within the Court's competence to address. Producers state that DOE can give the Court the benefit of its expertise by making recommendations to the Court by way of briefs.

Essentially similar positions are held by the first purchasers, refiners that actually purchased the petroleum in question. As presented in the brief filed by Total Petroleum, the first purchasers' position embraces the theory that *Hanover Shoe* and *Illinois Brick* preclude examination of passed through costs, and that the first purchasers are entitled to the entire amount of overcharges. The first purchasers contend that allowance of passed through recovery would subject the first pur-

chasers to double liability if private parties sue them pursuant to Section 210 for the overcharges. The first purchasers argue that this is not a Section 209 action and is not a Section 210 action, but is analogous to a Section 210 action.

Not dissimilar contentions are advanced by the indicated refiners, who also oppose referral, reject pass through recovery by marketers and consumers, and question DOE's objectivity and competence. The key thrust of the indicated refiners' approach is that all refiners who participated in the Entitlements Program are eligible for recovery, and not just those who actually purchased the oil in question. This is required, contend the indicated refiners, because the Entitlements Program served to spread the overcharges equally among all participants in the Entitlements Program. In addition to opposing consideration of passed through overcharges on *Illinois Brick* grounds, the indicated refiners contend that overcharges were not passed on, because market conditions restricted what refiners could charge and thus the refiners bore the burden of the overcharges. The indicated refiners also contend that the forces of the market will force them to pass through the refunds they receive from the escrow fund in the form of reduced prices to ultimate consumers.

The intervening States argue that referral is unnecessary and contend that this Court should order distribution to the States as representatives of the ultimate consumers of petroleum products. The States rely on the recent opinion of Judge Flannery in *United States v. Exxon*, 561 F.Supp. 816 (D.D.C. 1983), in which the Court ordered distribution to the States for use in programs designed to benefit petroleum consumers. The States argue that review of the regulatory statutes shows that overcharges were passed along to the ultimate consumers and that it would be impossible to ascertain the precise damage borne by the ultimate victim.

Thus, since DOE could not precisely determine losses suffered by particular claimants, the Court should, in the interests of restitution and equity, distribute the fund to the States, in proportion to their citizen's use of petroleum products during the controls period, for use in energy-related programs. To refer the case would, in the States' view, plunge the agency, the Court, and the escrow fund into an administrative quagmire.

The States argue, however, that if their proposal for immediate payout to the States is not endorsed by the Court, the motion to refer should then be granted. They argue that if the quagmire must be entered, DOE has the expertise and procedures to best accommodate the expedition. The States also contend that the Court can exercise supervisory control over the DOE to allay fears of bias and to insure prompt attention to the case.

Intervening purchasers have split on the issue of referral. The National Oil Jobbers Council (NOJC), a federation of 42 trade associations representing thousands of small petroleum marketers, favors referral. The NOJC contends that the Government has the duty to at least try to ascertain the identity of overcharge victims, and cites *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Em. App. 1982) in support of this contention. The NOJC contends that there is no factual basis, in the absence of such an attempt, to conclude that none of the overcharge victims can be identified.

A number of other intervening purchasers, seeking to represent classes of gasoline retailers, trucking companies and electric utilities, opposed referral. They raise questions of agency bias and assert the Government is or may be trying to appropriate the funds for itself. They challenge DOE's competence and expertise and claim that referral will merely cause further delay in resolving this case. They raise the possibility of the Court appointing a special master and generally contend that the distribu-

tion issue is within the Court's competence and province to resolve.

Consideration of the above questions leads the Court to conclude that two basic questions must be resolved before a decision on referral can be made:

1. Are any parties other than the first purchasers or participants in the Entitlements Program entitled to refunds?

2. Is it clearly impossible to ascertain particular harms suffered by particular parties by virtue of the overcharges?

If the first question is answered in the negative, then it must be asked: why refer? If the answer to the first question is affirmative, however, the second question becomes decisive. If it is clearly impossible to ascertain the impact of overcharges with particularity, does equity require that the fund be distributed in the public interest to the States, or to the Government standing in place of the ultimate consumers? The Court will now examine these questions in detail.

The key legal issue in deciding whether any parties other than first purchasers or participants in the Entitlements Program can recover is the applicability of *Hanover Shoe* and *Illinois Brick* to this case.

In *Hanover Shoe*, supra, the Supreme Court held that defendant in a private antitrust action could not assert the "passing on" defense that plaintiff shoe manufacturer suffered no legally cognizable injury because it increased the prices it charged its customers (i.e., it "passed on" the overcharges caused by defendant's illegal actions). The Court's reasoning on this issue is as follows:

> "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the

> nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
>
> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* consumers. These ultimate consumers, in today's case the buyer of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

Hanover Shoe, 88 S.Ct. at 2231-2232.

In *Illinois Brick*, supra, the Court concluded that the pass-on rule must be applied equally to plaintiffs and defendants, and held that only the direct purchasers, and not others in the chain of manufacture or distribution could recover for overcharges. As in *Hanover Shoe*, the Court emphasized both the complexity that pass-on theories entail and the resultant impairment of private antitrust enforcement. The Court noted:

> "Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."

Illinois Brick, 97 S.Ct. at 2070.

The Court also noted:

> "The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damage action could seriously impair this important weapon of antitrust enforcement."

Illinois Brick, 97 S.Ct. at 2074.

Based on *Hanover Shoe* and *Illinois Brick*, TECA has held that the passing on defense cannot be used in a private enforcement action under Section 210 of the Eco-

nomic Stabilization Act. *Eastern Air Lines, Inc. v. Atlantic Richfield*, supra.

This Court does not believe the rationale of *Hanover Shoe* and *Illinois Brick* is applicable, however, in this action. This action is fundamentally different from a private enforcement action under the Antitrust Laws or under Section 210 of the Economic Stabilization Act. In this action, oil producers sought declaratory judgments to forestall government enforcement of overcharge violations under Section 209. Preliminary injunctive relief was granted, conditioned on the oil producers paying the alleged overcharges into escrow. The Court now considers this action to be, in effect, a Government enforcement action in which the fact of overcharge has been determined and the Court is now faced with effecting restitution.

In the Court's view, the difficulty in computing passed on costs and the subsequent adverse effect on antitrust enforcement were inextricably bound together in *Hanover Shoe*. In that case the Court found that addition of pass-on issues to already protracted private antitrust suits would seriously hamper the scheme of private enforcement of the antitrust laws. In *Illinois Brick*, the Court was faced with the problem of whether to permit offensive use of pass-on theories after defensive use had been barred by *Hanover Shoe*. The Court declined to allow offensive use, repeatedly emphasizing the adverse impact on private antitrust enforcement that pass-on theories would entail. As one commentator noted:

> "The *Illinois Brick* result apparently rests on the proposition that a rule allowing all purchasers to recover would so reduce the incentives for direct purchasers to bring suit that while there might be some enforcement gains at the indirect purchaser level, the total number of suits would decline."

The Supreme Court, 1976 Term, 81 Harv. L.Rev. 72, 226 (1977).

In this case no such fears are applicable. There is no private enforcement involved, and thus, no incentive to encourage private suits by disallowing pass-on theories. On that ground alone, the *Hanover Shoe—Illinois Brick* doctrine is inapplicable to an action under Section 209 or an action, such as this one, closely analogous to a Section 209 action. While *Hanover Shoe* and *Illinois Brick* may be suitable for Section 210 actions, it must be noted that the objectives of Section 209 differ significantly from those of Section 210. Section 210 provides for private suits seeking damages. Section 209 provides for Government action in which the Court may order restitution.

In Section 209, Congress gave the courts "equitable power . . . to set things right and order restitution." S.Rep. No. 92-507, 92nd Cong., 1st Sess. reprinted in 2, 1971 U.S.Code Cong. & Ad.News 2283, 2291, quoted in *Sauder v. Department of Energy*, 648 F.2d 1341 (Em. App. 1981). In *Sauder*, TECA made clear that restitution, as provided in Section 209, is fundamentally an equitable concept. The Court quoted *Moore's Federal Practice* Vol. 5, ¶ 38.24[2], stating:

> "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore the status quo or to accomplish both objectives." 648 F.2d at 1348.

TECA approved an action which did not seek damages, "which may or may not be the amount of the overcharge," but sought restitution. TECA also made it clear that the Court's equitable power is broad:

> "There is no indication . . . that the section thereby attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution."

Sauder, 648 F.2d at 1348.

Restitution seeks to restore the status quo but, if that is not possible because the status quo has been permanently altered, restitution seeks to provide other kinds of compensation. See *Restatement of Restitution*, § 1, comment a (1937).

Thus, the restitutionary nature of Section 209 and of this action differ fundamentally from the damages remedy of Section 210 and of the Antitrust Laws. For this additional reason, the *Hanover Shoe* and *Illinois Brick* cases do not apply to this action. This was also recognized by the District Court in *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871 (S.D. Ala. 1980), *rev'd on other grounds*, 669 F.2d 717 (Em.App. 1982), which rejected attempts to bar consideration of pass-on consequences. Referring to *Hanover Shoe* and *Illinois Brick*, the Court stated:

> "The policies underlying those cases are largely inapplicable to enforcement actions by the government, and restitutionary relief by its nature does not have some of the difficulties which arise in actions for damages.
>
> "In an enforcement action, there is no danger that the incentive to enforce the law will be reduced by permitting indirect purchasers to recover."

499 F.Supp. at 884.

The Court would also note that the fundamental difference in and independence of the 209 and 210 remedies were recognized by TECA in *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (Em. App. 1980).

The first purchasers have also raised the spectre of potential double liability if pass through is allowed and they are then subject to a private enforcement action under Section 210. It has been recognized, however, that both private and public remedies may be applied to the same violation. *Bulzan v. Atlantic Richfield Co.*, supra.

In *Bulzan*, TECA noted a number of solutions to the multiple liability problem, stating that one solution is adjudication of a liability action under Section 210 "to take into account a prior or subsequent" restitution award. *Bulzan*, at 283-284. The spectre of double liability was similarly dispelled in *U.S. Oil Co., Inc. v. Koch Refining*, 518 F.Supp. 957 (E.D. Wis. 1981); *Martin Service v. Koch Refining Co.*, Unpub. No. 81-1844 (E.D. Ill., Oct. 18, 1982); *Ray L. Hunt v. Department of Energy*, Unpub. No. CA-3-78-02440-W (N.D. Tex. July 25, 1983).

Since considerations of equity are so vital in restitution, the Court must note that allowing first purchasers to retain all of the overcharges, particularly in the absence of a factual showing that they did not pass on some or all of the overcharges, would not be an equitable result. This is particularly true when the first purchasers' proposed remedy would result in most of the overcharges being returned to plaintiffs in this action, who were the parties responsible for and who attempted to benefit from the overcharges in the first place. At this stage of the proceedings, there are no facts to show that this would not be an inequitable windfall to the first purchasers or indicated refiners.

Having concluded that recovery is not limited to first purchasers or the participants in the Entitlements Program, the Court must now consider whether it is clearly impossible to ascertain with particularity the parties that bore the burden of the overcharges. The States argue that such a task is clearly impossible and, relying on Judge Flannery's opinion in *United States v. Exxon*, supra, contend that the States should receive the escrow fund for use in programs aiding energy consumers.

The Court tends to agree with the States and with Judge Flannery that it is likely that the ultimate consumers of petroleum products bore the brunt of these overcharges and that it will be impossible to determine

otherwise. If this is the case, the Court believes that the equitable goals of restitution would mandate distribution to either the state governments or the federal government for use in programs designed to aid energy consumers. Such a distribution would be akin to the *cy pres* doctrine in the legal field of charitable trusts where, when it is impossible to carry out the specific intent of the testator, courts dispose of the funds in the "next best" manner. Such a doctrine has been extended to the distribution of funds in class action and overcharge cases and, where it is impossible to specifically identify the proper claimants, allows the funds to be used in a manner designed to benefit the claimants as a class. See *Note, Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation,* 32 Stan.L.Rev. 1039 (1980).

This approach was most notably applied in *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970); *aff'd.*, 440 F.2d 1079 (2nd Cir 1970), *cert. denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). This was a nationwide antitrust class action against drug companies accused of price fixing brought by 37 states on behalf of consumers. Pursuant to a court-approved settlement, a fund of 37 million dollars was administered for refunds to individual consumers, but application of a claim procedure still left 32 million dollars in the fund. This was distributed to states for use in public health programs. A similar rationale underlay Judge Flannery's remedial action in *United States v. Exxon*, supra, in which the overcharges were placed in an escrow account for distribution to the states for use in energy conservation programs.

Likewise, a direct refund to the United States treasury would serve equitable and restitutionary goals. While such a remedy would not aid energy consumers as directly as refunded to the states for use in energy programs, it would have certain advantages. It would in-

volve virtually no administrative expense and would benefit the public at large by increasing federal revenues. Since mobile transportation is an all-encompassing way of life in our nation, those injured may well be the public at large. Hence such a distribution would probably serve the purpose of aiding the injured party. It would also, of course, fulfill the restitutionary goal of requiring plaintiffs to disgorge their judicially-determined illegal gains. See *Note, Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation,* 79 Mich.L.Rev. 1454, 1473 (1981).

The Court reaches no conclusion as to what remedy would be the most efficacious or equitable, but merely points out that equitable remedies do exist in the absence of proof as to the particulars of the burden of the overcharges. The Court believes, however, that an attempt must be made to determine if particular harm can be shown and that Judge Flannery's resolution in *Exxon* was premature. The Court believes this approach is required by TECA in light of *Citronelle-Mobile Gathering Co. v. Edwards,* supra, where the Court concluded:

> "The Government has a *duty* to try to ascertain those overcharges, and refund them, with interest, from the restitutionary funds."

669 F.2d at 723.

The Court would note that it has before it no *facts* at this time which could establish that it is impossible to identify at least some of the injuries caused by the overcharges. For the Court to conclude that impossibility at this time would be a too-hurried retreat from the objective of restitution to most nearly restore the status quo and return to those overcharged the amount of their loss.

Having reached that conclusion, the Court must reject the request of the States for immediate distribution to

them. The Court has thus rejected various claims for immediate distribution and concluded that an attempt must be made to identify those harmed by the overcharges. The basic question remaining is whether this issue should be referred for fact-finding to the OHA of the DOE.

Where the claim before the Court requires the resolution of issues which, under a regulatory scheme, are placed within the purview of an administrative agency, the doctrine of primary jurisdiction may be applied to suspend the judicial process pending referral of such an issue to the administrative agency. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956). In the *Western Pacific* case, the Supreme Court noted:

> "[i]n cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."

77 S.Ct. at 165.

The Supreme Court has empasized that referral is useful when uniformity and consistency is important and where technical questions of fact within the expertise and the experience of the agency exist. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976). Referral is also desirable when one compares the flexibility or agency procedures with the rigidity too often characteristic of court procedures. *Sunflower Electric Coop. v. Kansas Power & Light Co.*, 603 F.2d 791, 795 (10th Cir. 1979). The doctrine is best summarized in fn. 14 of *Columbus Gas Transmission v. Allied Chemical Corp.*, 652 F.2d 503 (5th Cir. 1981), wherein it is stated at 519:

> "It is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agen-

> cies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases where referral is necessary to secure uniformity and consistency in the regulation of business, such as issues requiring the exercise of administrative discretion."

In the Court's view, the tracing of overcharges involves complicated and technical questions of fact, compounded by the impact of regulatory phenomena such as the Entitlements Program and the "banking" of costs. The OHA has developed procedures for refund claims in overcharge cases and is better equipped than the Court to make preliminary findings concerning the particular impact of overcharges on various parties.

Opponents of referral have pointed to the rather rocky beginning OHA experienced in developing refund procedures, but it appears that OHA has now made significant progress in implementing such procedures. See *Office of Enforcement*, 9 DOE ¶ 82,521 (hereinafter Alkek); *Office of Enforcement*, 9 DOE ¶ 82,553 (hereinafter Adams), which show that OHA is progressing with large refund proceedings. The agency has established a mechanism for considering applications for refunds, known as Subpart V procedures.

The Court believes that the large number of technical questions involved in attempting to determine the allocation of the burden of overcharges in the thicket of the regulatory scheme could more efficiently be addressed before the OHA. The Court does share the concern of the parties who have noted that OHA has not been as efficient at handling claims as might be hoped. The Court will therefore retain jurisdiction over this case and require regular progress reports from the Department on its handling of the referred matters in this case.

The Court is also aware of the concern of some parties of DOE bias in this case, and notes that the Department

has not taken a position on what the final disposition of the escrowed funds should be. Positions of the DOE in other actions concern some parties. The Court emphasizes that he is referring to the DOE only the factual question concerning the particularized impact of the overcharges. The Court is specifically retaining jurisdiction and will make the final determination of the disposition of the funds. The Court, not the DOE, will decide where the funds go. The Court does believe, however, that the OHA's claim process and DOE's acquired expertise, will assist the Court in developing the facts needed for an equitable disposition of the funds.

The Court notes that it can retain jurisdiction of this matter while referring only limited factual questions to the agency. See *Israel v. Barter Laboratories*, 466 F.2d 272 (D.C.Cir. 1972); *Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964). The Court is retaining jurisdiction of this action, and is merely suspending its consideration of the issues in this case in order to allow OHA to attempt to determine with particularity the tracing and impact of the overcharges or any portion of them in this case.

The Court is therefore referring to the Office of Hearing and Appeals of the Department of Energy the task of attempting to determine what parties bore the cost of the overcharges and in what amounts. The Court will also welcome the views of the OHA on how restitution can best be achieved in this case. The Court, however, is retaining jurisdiction over both this action and the escrow fund. No determination of restitution nor payout from the escrow fund may be ordered by the OHA, as such matters remain within the province of this Court.

The Court also orders OHA to make an interim report to the Court within six months of the date of this order, and a final report to the Court within one year from the date of this order, regarding the extent of its progress

in determining the questions referred. The Court realizes that these matters are complex and that considerable time may well be needed for OHA to complete its assigned task. Nevertheless, the Court would expect substantial progress in one year, and emphasizes that this is MDL litigation deserving the utmost expedition. If substantial progress is not made, OHA is ordered to provide detailed explanation of why progress has been lacking. A lack of progress and the reasons therefore may indicate to the Court that the process is futile and may require the Court to take equitable action as noted elsewhere in this opinion. On the other hand, the Court may determine that more time and a greater effort on the part of OHA is all that is required. These issues will be explored by the Court after receipt of OHA's reports.

IT IS THEREFORE ORDERED AND ADJUDGED that the Department of Energy's motion to refer is granted, with the following conditions:

1. This Court retains jurisdiction over this action and over the escrow fund. All decisions concerning restitution and payout from the fund are reserved to this Court for judicial resolution.

2. The Department of Energy's Office of Hearings and Appeals is ordered to conduct factfinding pursuant to its regulatory process concerning the particularized tracing and impact of the overcharges at issue in this case. The DOE is ordered to make an interim report to this Court within six months of the filing of this order, and a final report within one year from the date of this order, concerning its progress in such factfinding.

3. All parties with claims on the escrow fund in this case shall submit specific proof thereof to the OHA consistent with the regulatory process established by that agency.

4. The Court will suspend its consideration of this action, pending OHA's reports to this Court, or until further order of the Court. The Court will hold in abeyance all pending motions until that time, including motions to intervene or to certify class actions.

IT IS FURTHER ORDERED, for the reasons set forth in the foregoing memorandum, that the motions of Total Petroleum and Farmland Industries for immediate distribution from the escrow fund are hereby denied.

On Motion to Certify Constitutional Issues

On September 13, 1983, this Court referred the issue of the appropriate remedy in this multidistrict litigation to the Office of Hearings and Appeals [OHA] of the Department of Energy [DOE], with instructions to the OHA to report in March and September of 1984 on its progress. The relief afforded to the Court by this referral has, however, been short-lived. The case is once more before the Court on a hotly contested and heavily briefed motion. The plaintiffs, various oil producers, have moved this Court to certify three constitutional issues concerning one house legislative vetoes in the Emergency Petroleum Allocation Act [EPAA] and the Energy Policy and Conservation Act [EPCA] to the Temporary Emergency Court of Appeals [TECA] for consideration in light of the United States Supreme Court's recent declaration that one-house legislative vetoes are unconstitutional, *see Immigration and Naturalization Service v. Chada*, — U.S. —, 103 S.Ct. 2764, 77 L.Ed2d 317 (1983). Numerous parties, including the DOE, intervening states, and intervening purchasers, hereinafter collectively referred to as the defendants, are bitterly opposed to any certification. For the reasons that follow, this Court believes that substantial constitutional issues exist in this case, and that those constitutional issues must be certified to TECA, *see* § 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

I. Brief Factual and Procedural Background

This action was originally brought by an individual plaintiff to enjoin the DOE and its predecessor, the Federal Energy Administration, from enforcing Ruling 1974-29, which concerned low-production oil wells commonly referred to as "stripper wells." This Court enjoined enforcement of the Ruling, but required the plaintiffs to deposit into an escrow account the difference between the higher stripper well price the injunction permitted them to receive and the lower controlled crude oil price they would otherwise have received. This escrow fund currently contains approximately eight hundred million dollars.

Unfortunately, this litigation has tread a rocky road to arrive at the present motion. First, this Court concluded that Ruling 1974-29 was void, *Energy Reserves Group, Inc. v. Federal Energy Administration*, 447 F. Supp. 1135 (D.Kan.1978). This conclusion was reversed by TECA in a two-to-one decision, and the case was remanded for trial, *Energy Reserves Group, Inc. v. The Department of Energy*, 589 F.2d 1082 (Emp.App.1978). Numerous other cases concerning the same issue were collected around the country and consolidated here as multidistrict litigation in June of 1979, *In re The Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (Jud.Pan.Mult.Lit.1979). After a brief second sojourn at TECA in which the DOE unsuccessfully attempted to obtain a writ of mandamus against this Court, *Duncan v. Theis, Chief Judge*, 613 F.2d 305 (Em.App. 1979), the case was finally tried in early 1981.

After the trial, this Court concluded that Rule 1974-29 was arbitrary, capricious, and contrary to the expressed intent of Congress, *In re The Department of Energy Stripper Well Exemption Litigation*, 520 F.Supp. 1232 (D.Kan.1981). The case was then taken to TECA for the third time, and TECA once again reversed, *In re*

the Department of Energy Stripper Well Exemption Litigation, 690 F.2d 1375 (Em.App.1982), *cert. denied*, — U.S. —, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983). The final section of TECA's opinion reads as follows:

Conclusion

In summary, we find:

1) The legislative history of the stripper well exemption amply supports the DOE's position that injection wells were not intended by Congress to be included in the well count;

2) Ruling 1974-29 is not beyond the authority of the DOE granted by the controlling statutory provisions;

3) Our prior decision in *Energy Reserves I, Duncan v. Theis* and *Wiggins* have correctly decided that Ruling 1974-29 is a reasonable interpretation of the applicable statutes and regulations; and

4) The stripper well regulations, as interpreted by Ruling 1974-29, are neither arbitrary nor capricious.

For all these reasons, the decision of the district court is reversed, and these consolidated cases are remanded to the district court with instructions to enter judgment for the [defendants].

Id. at 1392. In accordance with TECA's instructions, judgment was entered for the DOE on February 14, 1983, *see* Dk. No. 282, in the following words:

> IT IS THEREFORE ORDERED that judgment is hereby rendered in favor of defendants and against plaintiffs, in accordance with the mandate of the Temporary Emergency Court of Appeals filed herein on September 20, 1982.

Dk. No. 282, at 2. As the Court stated in its Order of September 13, 1983.

> The remaining task is the appropriate dispensation of the escrowed funds—in effect a monumental interpleader action with potential classes and sub-classes.

578 F.Supp. at 589.

After hearing from the various parties and intervenors at extraordinary length, this Court concluded that the most expeditious method of proceeding was for this Court to retain jurisdiction over both the case and the escrowed funds while referring the factfinding as to who bore the brunt of the overcharges to the OHA, 578 F. Supp. at 596-97.

On November 14, 1983, the plaintiffs moved to certify three constitutional issues to TECA, to vacate the referral of factfinding to the OHA, and to release the escrowed funds. The three constitutional issues are stated by the plaintiffs as follows:

> 1) Whether the Emergency Petroleum Allocation Act, as amended, must be declared unconstitutional, *ab initio*, because it contains an invalid and inseverable one-house legislative veto provision that was twice utilized to the detriment of plaintiffs.
>
> 2) Whether the Oil Pricing Policy added as section 8 to the Emergency Petroleum Allocation Act by section 401 of the Energy Policy and Conservation Act must be declared unconstitutional, *ab initio*, because it contains three invalid and inseverable one-house legislative veto provisions and imposed price controls to the detriment of plaintiffs.
>
> 3) Whether MDL No. 378 must be dismissed for lack of subject matter jurisdiction in view of the constitutional invalidity of the Emergency Petroleum Allocation Act as amended, and section 401 of the Energy Policy and Conservation Act.

Memorandum in Support of Plaintiffs' Motion, Dk. No. 520, at 1-2. The Court heard extensive oral argument on

the motions on Monday, January 16, 1984, and is now ready to rule.

II. Preliminary Issues

No one disputes that the *Chada* decision declared one-house legislative vetoes to be an unconstitutional infringement of the Article I requirements of bicameralism and presentment. Instead, the defendants present four essentially procedural arguments in support of their basic assumption that the plaintiffs cannot raise their constitutional challenge at this juncture. The defendants assert that: (1) the motion to certify the constitutional issues is inexcusably tardy; (2) the plaintiffs are without standing to raise the constitutional challenge; (3) the legislative vetoes in the EPAA and EPCA are, in any event, severable from the remainder of the acts; and (4) retroactive application of *Chada* would be inequitable. The Court will deal with these assertions in the order listed.

(1) Timeliness

The defendants first argue that the plaintiffs' motion is inexcusably tardy because judgment has already been entered in this case, *see* Dk. No. 282, and because Rule 60 of the Federal Rules of Civil Procedure provides no mechanism whereby that judgment may be modified. This argument proceeds from the erroneous assumption that a *final* judgment has been entered in this case.

Rule 54(b) of the Federal Rules of Civil Procedure explicitly states that

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and

> upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

The judgment entered on February 14, 1983, Dk. No. 282, is on its face not a final order. The rights and liabilities of the plaintiffs, the defendants, and the numerous intervenors simply were not finally adjudicated by that order. No disposition of the huge escrow fund was made, and all parties still maintain their entitlement to that fund. The Court, in fact unequivocally expressed its understanding that no final judgment was entered when it *expressly retained jurisdiction over the case and the escrow fund* while referring the factfinding mission to the OHA. Such retention would have been nonsensical had a final judgment adjudicating all the claims and the rights and liabilities of all of the parties been entered seven months earlier. Additionally, the substantial factfinding presently being conducted by the OHA and the difficult question remaining for the Court of who gets the money make any notion of finality in this case untenable at this time. Because the question of who gets the money is unresolved, and because a decision that the EPAA and EPCA are unconstitutional could have a major impact on the resolution of that question, this Court believes that the plaintiffs' motion to certify the constitutional issues is timely.

(2) Standing

The essence of the standing challenge is the supposed lack of injury from an exercise of the concededly uncon-

stitutional one-house vetoes. The short answer to this argument is that the plaintiffs allege that the EPAA and EPCA must be declared void *ab initio* because of the one-house vetoes, and that the money presently in the escrow fund must, therefore, be restored to the plaintiffs because it was exacted from them under unconstitutional acts. Clearly, the exaction of large sums of money under unconstitutional acts is an injury, that injury is traceable to those acts, and that injury could be redressed by a declaration that the acts are unconstitutional and that the money should be returned to the plaintiffs, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). This Court believes that the plaintiffs have a sufficient "personal stake in the outcome of this controversy to warrant [their] invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on [their] behalf," *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-61, 97 S.Ct. 555, 560-61, 50 L.Ed.2d 450 (1977); *Holly Sugar Corp. v. Goshen City Cooperative Beet Growers Association*, 725 F.2d 564, 567-68 (10th Cir. 1984). The plaintiffs therefore have standing to assert their constitutional challenge.

(3) and (4) Severability and Retroactivity

The Court will consider these two assertions together because a similar analysis applies to both. As a preliminary matter, it must be remembered that this Court lacks jurisdiction to determine the constitutional validity of any provision of the EPAA or EPCA, or of the regulations under those Acts, inasmuch as exclusive jurisdiction over those issues is vested in TECA and the United States Supreme Court by way of appeal, see § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. If *any* substantial constitutional issue exists, it *must* be certified to TECA, see *id.* § 211(c).

These restrictions on this Court's jurisdiction and power are relevant to the defendants' final two assertions because those assertions invite this Court to reach the merits of the constitutional challenge, albeit indirectly. Were this Court to conclude that the concededly unconstitutional one-house vetoes are severable from the remainder of the Acts, the Court would also be concluding that the remainder of the Acts passes constitutional muster, despite the plaintiffs' vigorous assertion that the Acts must be declared void *ab initio*. Likewise, a decision that *Chada* will not be applied retroactively to this litigation would be tantamount to a delaration that the price controls are constitutionally sound enough to be enforced by the final judgment this Court must eventually enter disbursing the escrowed funds. Both of these inquiries are so firmly intertwined with the merits of the constitutional challenge as to be inseverable from it and, therefore, outside this Court's jurisdiction and power to hear.

The parties have briefed these issues with their customary professionalism and attention to detail, and their lengthy citations to the case law and the legislative histories of the Acts have demonstrated that each side has a substantial argument and that the question is indeed a close one. This demonstration has helped to convince this Court that the constitutional issues raised by the plaintiffs are substantial, and that those isssue must, therefore, be certified to TECA.

III. Certification

IT IS THEREFORE ORDERED that the three constitutional issues raised by the plaintiffs and set out verbatim in this Memorandum and Order, *supra* p. 599, be certified to the Temporary Emergency Court of Appeals.

IT IS FURTHER ORDERED that the plaintiffs' motions to vacate the referral of factfinding to the OHA

and to release the escrowed funds be held in abeyance pending TECA's resolution of the constitutional issues.

IT IS FURTHER ORDERED that OHA continue uninterrupted with its factfinding mission.

IT IS FURTHER ORDERED that this Court retain jurisdiction over this case and over the escrowed fund to the maximum extent consistent with the certification of constitutional issues to TECA.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ENERGY RESERVES GROUP, INC. and
SUBURBAN PROPANE GAS CORPORATION,
Plaintiffs,

vs.

FEDERAL ENERGY ADMINISTRATION and
JOHN F. O'LEARY, Administrator,
Federal Energy Administration,
Defendants.

[Filed Jun. 10, 1977]

PRELIMINARY INJUNCTION

On this 26th day of May, 1977, this matter comes on for hearing on the motion of the plaintiffs herein for a Preliminary Injunction. The plaintiffs appear by Joseph W. Kennedy and Robert I. Guenthner of Morris, Laing, Evans, Brock & Kennedy, Chartered, and the plaintiff Energy Reserves Group, Inc. also appears by Paul B. Swartz of Martin, Pringle, Schell & Fair. The defendants appear by Jon K. Sargent, Deputy United States Attorney for the District of Kansas; Robert Heiss, Office of General Counsel, Federal Energy Administration; and Linda L. Pence, United States Department of Justice.

THEREUPON, the matter proceeds to hearing and trial and the plaintiffs present their evidence and rest. The defendants offer no evidence.

THEREUPON, the Court, after considering the evidence introduced at the hearing, the Affidavits in support of the Motion for Preliminary Injunction previously filed and the arguments and statements of counsel, makes the following findings of fact and conclusions of law:

1. The Court finds that the plaintiffs have made a substantial showing of irreparable damage which would result to them in the event the Motion for Preliminary Injunction is denied.

2. The Court further finds that this action is not frivolous, that there are serious questions raised by the plaintiffs' Complaint herein, and that the plaintiffs have demonstrated a reasonable probability of success on the merits of this action.

3. The Court further finds that the importance of the rights asserted by the plaintiff herein predominate over the importance of the acts sought to be enjoined in that the substantial pecuniary loss to the plaintiffs if the injunction is denied outweighs the little, if any, adverse impact on the public interest herein. In fact, the Court finds that it is in the public interest to have the validity of the ruling in question in this case judicially determined and that both the plaintiffs and defendants desire to have the judicial determination concerning the validity of such ruling.

4. The Court further finds that the interests of all parties can be protected during the pendency of this action by appropriate orders providing for the refund of any later determined overcharges for the price of crude oil. Because of this the Court finds that the entry of a preliminary injunction will in no way damage the defendants or the public interest and will serve to protect the rights of the plaintiffs while this matter is in litigation.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that

the defendants, their officers, agents, servants, employees and attorneys are hereby restrained and enjoined, pending the final determination of this action, from taking any action whatsoever to enforce, or attempting to enforce, any final order of the Federal Energy Administration against the plaintiffs herein, which final order is based on alleged violations of Federal Energy Administration Regulations construed in accordance with FEA Ruling 1974-29.

IT IS FURTHER ORDERED that the defendants, their officers, agents, servants, employees and attorneys are hereby restrained and enjoined from enforcing the civil and criminal penalty provisions of FEA regulation § 205.203 against plaintiffs to the extent that plaintiffs would otherwise be subject to such penalties as a result of their certification during the pendency of this action of oil properties operated by them as stripper well properties based on the counting of injection wells located on such properties in the computation of average daily production if it is ultimately determined that such counting of injection wells is improper.

IT IS FURTHER ORDERED that the plaintiffs shall pay, or cause to be paid, to the Clerk of the United States District Court for the District of Kansas, at Wichita, Kansas, the difference between the price received for crude oil sold pursaunt to any and all certification of a property as a stripper well property and the price for which such crude oil would have been sold had the same been sold pursuant to a certification of the property as a non-stripper property.

IT IS FURTHER ORDERED that the Clerk of this Court invest any and all funds so received in interest bearing short-term obligations of the United States Government until the further order of this Court.

IT IS FURTHER ORDERED that, in the event funds so paid to the Clerk of this Court, are later determined

to be subject to refund to the purchaser of the crude oil, then at that time said funds shall be paid directly to the purchaser of the crude oil together with all accrued interest thereon, in full satisfaction and discharge of the plaintiffs' refund obligations pursuant to appropriate regulations of the Federal Energy Administration.

IT IS FURTHER ORDERED that the foregoing provision concerning payment of funds to the Clerk of this Court fully satisfies the requirement for security for a preliminary injunction as provided in Rule 65(c) of the Federal Rules of Civil Procedure.

IT IS BY THE COURT SO ORDERED.

/s/ Judge Frank Theis

APPROVED:

/s/ Joseph W. Kennedy
JOSEPH W. KENNEDY of
Morris, Laing, Evans, Brock
& Kennedy, Chartered
Suite 430, 200 West Douglas
Wichita, Kansas 67202

One of the Attorneys for Plaintiffs.

/s/ Linda L. Pence
LINDA L. PENCE (Approved As To Form)
United States Department of Justice
Washington, D.C.

One of Attorneys for Defendants.

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS

Nos. 9-80, 9-81

GULF OIL CORPORATION,
Defendant-Appellant and Cross-Appellee,

v.

RICHARD W. DYKE, dba WESTERN STATIONS CO., COLVIN OIL COMPANY, and F.O. FLETCHER, INC., dba FLETCHER OIL COMPANY,
Plaintiffs-Appellees and Cross-Appellants,

UNITED STATES OF AMERICA,
Intervenor.

Argued March 19, 1984

Decided April 17, 1984

Jack D. Fudge and Michael L. Hickok, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., on the brief for appellant/cross-appellee.

John L. Schwabe and Neva T. Campbell, Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, Or., on the brief for appellees/cross-appellants.

John R. Knight, Edward T. Cotham, Jr. and Bradley Ford Stuebing, Gulf Oil Corporation, Houston, Tex., on the brief for appellant/cross-appellee.

Larry P. Ellsworth, Asst. General Counsel, David Engels and Marcia K. Sowles, Dept. of Energy, and Richard K. Willard, Acting Asst. Atty. Gen., Anthony J. Steinmeyer and Douglas Letter, Attys., Dept. of Justice, Washington, D.C., on the brief for the United States.

William H. Bode, John E. Varnum and Tobey B. Marzouk, Spriggs, Bode & Hollingsworth, Washington, D.C., on the brief for amici curiae, Independent Oil and Tire Co., Shepherd Brothers Service Stations, and U.S. Oil Co., Inc.

John A. Evans, Marathon Petroleum Co., Findlay, Ohio, William C. Streets and Gail F. Schulz, Mobil Oil Corporation, Fairfax, Va., R. Bruce McLean, P.C., Daniel Joseph, P.C., Warren E. Connelly, P.C., and David A. Holzworth, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., on the brief for amici curiae, Marathon Petroleum Co. and Mobil Oil Corp.

Before CHRISTENSEN, ESTES and ZIRPOLI, Judges.

ESTES, Judge:

This is an action for overcharges under § 210(b) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, as incorporated in the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 *et seq.* brought by Plaintiffs-Appellees and Cross-Appellants Richard W. Dyke, dba Western Stations Co., Colvin Oil Company, and F.O. Fletcher, Inc., dba Fletcher Oil Company (hereinafter "Dyke" when referred to collectively; "Richard W. Dyke" when referring to plaintiff Dyke singularly), against Defendant-Appellant and Cross-Appellee Gulf Oil Corporation (hereinafter ("Gulf").[1] Gulf also filed a counterclaim for unpaid bills for gaso-

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[1] Independent Oil and Tire Co., Shepherd Brothers Service Stations and U.S. Oil Company, Inc. have filed a joint brief as *Amici Curiae* on the prejudgment interest and attorneys' fees questions presented by this appeal.

line in the sum of $728,753.78 against Richard W. Dyke only,[2] which was not contested.[3] Dyke alleged that Gulf overcharged it in sales of gasoline from Gulf to Dyke between January 1974 and January 1977. An Amended Judgment entered on September 12, 1983[4] in the United States District Court for the District of Oregon was awarded to plaintiffs against Gulf in amounts as follows:

	Overcharges	Prejudgment Interest	Attorney's Fees
Richard W. Dyke, dba Western Stations Co.	$1,264,555.22	$ 557,588.38	$385,500
Colvin Oil Company	745,000.00	200,568.99	173,500
F.O. Fletcher, Inc.,dba Fletcher Oil Company	790,000.00	408,471.69	191,000
	$2,799,555.22	$1,166,629.06	$750,000

In addition to the $4,716,184.28, total of the above sums, the Amended Judgment also awarded costs and post-judgment interest to plaintiffs at the rate of 10.58 percent against Gulf. Gulf appeals from this judgment. Dyke has filed a cross-appeal contending the district court incorrectly computed the prejudgment interest which Dyke was awarded.

In October of 1972, Gulf's board of directors decided to divest Gulf of all its marketing activities in its San Francisco Retail Marketing District, which included northern California, northern Nevada, Oregon and Washington. The decision to divest followed losses by Gulf of $31.7 million in 1971 and $37 million in 1972 in the Northwest.[5] The passage of the EPAA, however, forced

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[2] Record at Vol. 1, Tab 2.

[3] Record at Vol. 1, Tab 3, p. 1.

[4] Record at Vol. 11, Tab 161. The Original Judgment entered August 25, 1983 (*Id.* at Tab 157) and first Amended Judgment entered August 26, 1983 (*Id.* at Tab 158) were set aside by Order of September 2, 1983 (*Id.* at Tab 160).

[5] Findings of Fact and Conclusions of Law ("FFCL"), Record at Vol. 11, Tab 147, pp. 4-5.

Gulf to continue to supply its customers in the area and to place its purchasers into classes which would maintain the customary price differentials in existence on May 15, 1973.[6] Gulf continued to supply all of its jobber customers in the area, but converted all of the branded jobbers[7] to unbranded jobbers on January 1, 1974. Before 1974, Gulf had supplied only one jobber in the district on an unbranded basis.[8]

On May 15, 1973, Richard W. Dyke, Colvin, and Fletcher all purchased gasoline from Gulf as resellers-retailers as defined in 10 C.F.R. § 212.31. Gulf was a refiner as defined in the same section. Richard W. Dyke and Colvin were among those purchasers who were branded jobbers on May 15, 1973 and converted to unbranded jobbers on January 1, 1974.

The other jobbers in the district who were reclassified from branded to unbranded on January 1, 1974, were placed in the Armour class of purchaser to reflect their new status. Richard W. Dyke and Colvin, however, were given base prices reflecting those published in *Platt's Oilgram* for May 15, 1973 for Portland and Eugene, Oregon and Seattle/Tacoma, Washington. Gulf reasoned that its jobbers in Oregon and Washington comprised a substantially different market from those in northern California and should constitute a separate class with a different base price. Gulf relied on the new item/new market rule[9] to justify its use of *Platt's Oilgram* in es-

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[6] 10 C.F.R. § 212.

[7] Gulf's branded jobbers received free painting of service stations, hauling allowances and the privilege of honoring Gulf credit cards. FFCL, *supra*, at 4. Dyke and Colvin were Gulf branded jobbers before January 1, 1974. *Id.*

[8] FFCL, *supra*, at 5-6. The unbranded jobber was Armour Oil Co., which purchased gasoline from Gulf's northern California terminals only. *Id.*

[9] FFCL, *supra*, at 11. The new item-new market rule, 10 C.F.R. § 212.111, allowed sellers to use a market price as the base price

tablishing a base price for Richard W. Dyke and Colvin, which is an exception to the rule that base prices must correspond to a price actually charged the most similar existing class on May 15, 1973.[10]

Richard W. Dyke filed a complaint on January 4, 1977 and ceased paying for gasoline received from Gulf on December 16, 1976, yet continued to receive gasoline without payment until January 28, 1977. Colvin's complaint was filed on October 11, 1977. Fletcher filed its complaint on October 20, 1977. The three cases were consolidated, with *Richard W. Dyke* proceeding to judgment first. The decision and findings in *Richard W. Dyke* were binding on Colvin and Fletcher.

The case was originally assigned to Chief Judge Skopil.[11] An interlocutory appeal was filed by the Department of Energy ("DOE") contesting their joinder in the cases. The DOE was released from further participation in the cases by this Court's decision and mandate and the district court order which followed.[12] On remand, new Chief Judge Burns granted a six-month stay in the proceedings before Judge Owen M. Panner was assigned to the cases in July, 1980.[13] Judge Panner lifted the stay on July 21, 1980.[14]

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for a product in certain instances rather than the price actually charged the most similar class of purchasers on May 15, 1973. Gulf later conceded that its use of the new item-new market rule was improper. FFCL, *supra*, at 11.

[10] *Pacific Supply Co-Op v. Shell Oil Co.*, 697 F.2d 1084 (Em.App. 1982).

[11] FFCL, *supra*, at 12, fn. 2.

[12] Record at Vol. 1, Tab 8, June 29, 1979; Record at Vol. 17, Tab 263, August 16, 1979. *See, Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (Em.App. 1979).

[13] FFCL, *supra*, at 12, n. 2. Judge Panner began duty as U.S. District Judge on March 24, 1980.

[14] Record at Vol. 1, Tab 14.

Trial before the court began on November 17, 1981. The trial was conducted in stages with succeeding orders entered as follows: In Phase 1, Gulf's use of the *Platt's Oilgram* prices as base prices for the plaintiffs was held improper. November 17, 1981; Record at Vol. 4, Tab 47. In Phase 2, the unbranded Armour class of purchasers and its corresponding base price was held proper for the plaintiffs. November 20, 1981; Record at Vol. 4, Tab 49. In Phase 3, the method of calculating the overcharges was decided, prejudgment interest was awarded to the plaintiffs, and the selection of the appropriate statute of limitations was made. January 20, 1982; Record at Vol. 7, Tab 67. In Phase 4, plaintiff Fletcher was held to be the real party in interest. April 15, 1982; Record at Vol. 7, Tab 80. In Phase 5, attorney's fees were awarded the plaintiffs. May 27, 1982; Record at Vol. 8, Tab 93.

The calculation of prejudgment interest was referred to a magistrate on June 1, 1982.[15] The magistrate entered his Findings and Recommendations on September 9, 1982, and they were adopted by the district court on October 26, 1982.[16] The district court entered its Findings of Fact and Conclusions of Law on June 20, 1983 [17] and filed a separate opinion on the issue of attorney's fees on August 23, 1983.[18] 571 F.Supp. 780. The Amended Judgment was entered on September 12, 1983.[19] Gulf filed its Notice of Appeal in this Court on October 6, 1983. Dyke filed its Notice of Cross-Appeal in this Court on October 20, 1983.

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[15] Record at Vol. 8, Tab 94.

[16] Record at Vol. 9, Tab 126; Vol. 10, Tab 129.

[17] Record at Vol. 11, Tab 147.

[18] Record at Vol. 11, Tab 155.

[19] Record at Vol. 11, Tab 161.

ISSUES

The issues on appeal, as stated by Gulf in its brief filed November 14, 1983, are as follows:

1. Whether overcharges can be refunded under the EPAA without any determination that sales exceeded the "maximum allowable prices" permitted under the governing Refiner Price Rule;

2. Whether prejudgment interest can ever be awarded on overcharge refunds under the EPAA;

3. If such prejudgment interest is ever recoverable, whether it can be awarded where the amount of overcharges to be refunded was unliquidated and became certain only by trial;

4. Whether attorney's fees may be awarded under the EPAA where the overcharges were found to be unintentional;

5. Whether attorney's fees awardable under the EPAA may substantially exceed those actually charged;

6. Whether appellee Fletcher lacks standing as an indirect purchaser to sue Gulf for overcharges under the EPAA;

7. Whether application of the two-year Washington statute of limitations to Fletcher frustrates national policy under the EPAA;

8. Whether the passing-on defense is available in this EPAA case because all parties were subject to Federal Price Regulations, and the trial court specifically quantified the amount of overcharges actually passed through; and

9. Whether the trial court abused its discretion by making a class of purchaser determination contrary to

the Pretrial Order without considering evidence offered in issue.[20]

Dyke states in its brief that the issue on the cross-appeal is: Whether the Trial Court erred in its calculation of prejudgment interest.[21]

Gulf's Motion to Dismiss

Gulf, without raising the question in the lower court, was given leave to file an untimely Motion to Dismiss the Cross Appeal of Dyke, which challenges the subject-matter jurisdiction of this Court following the recent Supreme Court decision in *I.N.S. v. Chadha*, —— U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Dyke has opposed the motion and contended that the *Chadha* decision did not invalidate the statutes. The United States has filed a motion to intervene on the question of the constitutionality of the statutes pursuant to 28 U.S.C. § 2403 and has also argued that the statutes remain valid.[22] Gulf contends that because the applicable statutes granting jurisdiction to this Court contain inseverable and unconstitutional legislative veto provisions, the legislation is void and this Court has no jurisdiction over the cross-appeal. It has been determined that Gulf's motion raises a jurisdictional question which we must decide.[23] After examination of the statutes, their legisla-

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[20] Brief of Defendant-Appellant and Cross-Appellee Gulf ("Gulf's Br.") at 3-4.

[21] Brief of Plaintiffs-Appellees and Cross-Appellants Dyke, *et al.* ("Dyke's Br.") at 1.

[22] Marathon Petroleum Company and Mobil Oil Corporation have filed a joint brief as *Amici Curiae* in support of Gulf's position that this case should be dismissed for lack of subject-matter jurisdiction.

[23] Gulf has placed itself in the anomalous position of moving to dismiss only Dyke's cross-appeal on the basis that the statutory authority for the cross-appeal is unconstitutional. Since Gulf's appeal also depends on the validity of the EPAA and EPCA, any

tive histories, prior decisions and the arguments of counsel, we conclude that the unconstitutional legislative vetoes contained in the EPAA and EPCA [Energy Policy and Conservation Act] are severable, leaving the remaining sections of the legislation intact and operable, including the sections conferring jurisdiction of this appeal upon this Court.

Neither the EPAA nor the EPCA contains a severability clause.[24] The absence of such a clause, however, is

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holding of this Court dismissing the cross-appeal because of the unconstitutionality of the EPAA or EPCA would also necessitate the dismissal of Gulf's appeal. Dyke has maintained that the constitutional issues raised by Gulf are not in reality directed at the subject-matter jurisdiction of this Court, but rather at the decision on the merits of the District Court below. *See, Memorandum filed by Dyke, et al.*, December 28, 1983 and *Memorandum filed by Dyke, et al.*, January 10, 1984. Dyke maintains that such an argument must first be raised in the District Court below. *See, United States v. Empire Gas Corp.*, 547 F.2d 1147, 1153 (Em.App. 1976), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1326, 51 L.Ed.2d 592. Gulf's motion does have such bearing on the subject-matter jurisdiction and the very viability of this Court as to mandate consideration here. We have a "duty to observe questions relating to jurisdiction whenever they may appear." *McWhirter Distributing Co. v. Texaco, Inc.*, 668 F.2d 511, 525 n. 22 (Em.App. 1981), *citing Condor Operating Co. v. Sawhill*, 514 F.2d 351, 354 (Em.App.), *cert. denied*, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975). *See also, Exxon Corp. v. F.E.A.*, 516 F.2d 1397 (Em.App. 1975).

[24] However, the ESA, which was the precursor of the EPAA and EPCA, does contain a severability clause at Section 220. We are also most persuaded by the language of Section 211(g) of the ESA that Congress intended this Court to sever unconstitutional portions of the statutes and leave the remainder intact: "[T]he Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the *constitutional validity of any provision of this title or of any regulation issued under this title.*" (Emphasis Added). This Court was given full authority to determine the unconstitutionality of one provision of a statute without the requirement of invalidating the whole statute as a result.

in no way dispositive of the question of severability. *E.E.O.C. v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984). Indeed, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138 (1968). The proper test is that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed.2d 1062 (1932).

In order to determine whether Congress would have enacted the remainder of the EPAA and EPCA had it known that the one-house veto provisions were unconstitutional, we must examine the language and legislative history of the Acts. *E.E.O.C. v. Hernando Bank, supra*, at 1190; *Muller Optical Co. v. E.E.O.C.*, 574 F.Supp. 946 (W.D.Tenn. 1983).

"Congressional intent and purpose are best determined by an analysis of the language of the statute in question." *E.E.O.C. v. Hernando Bank, supra*, at 1190.

The stated purpose of the EPAA is as follows:

> Sec. 2 . . .—
>
> (b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

The EPAA also states that it was enacted in the midst of circumstances which "constitute a national crisis which is a threat to the public health, safety, and welfare," EPAA § 2(a)(3), and that its purpose is to provide for "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at *equitable prices* among all . . . sectors of the petroleum industry." EPAA, as amended, 15 U.S.C. § 753(b)(1)(F) *quoted in United States v. Heller*, 726 F.2d 756 (Em.App. 1983). (Emphasis added.)

The purpose of the EPCA is stated, in part, in the Act as follows:

> Sec. 2. The purposes of this Act are—
>
> (1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program. . . .

While the stated purposes of the EPCA include a reference to the congressional veto, it does not follow that the veto provisions are inseverable. The intention of Congress to review the President's actions through the veto is obvious from the face of the legislation. Our task is to determine "whether Congress would have enacted the remainder of the statute[s] without the unconstitutional [veto] provisions." *Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 442 (D.C.Cir. 1982), *aff'd sub nom.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed. 2d 1402 (1983).

Gulf cites numerous portions of the legislative history in an attempt to prove that the compromise between the flexibility desired by the Executive and the oversight demanded by Congress was an extremely fragile one which could not have been enacted absent the legislative veto provisions. In none of these references, however, do we

find a clear indication that the EPAA or EPCA would not have been passed without such vetoes. *E.E.O.C. v. Hernando Bank, supra,* at 1191. The mere presence of continued and heated debates prior to the passage of the Acts cannot provide the evidence necessary for us to conclude that the legislative vetoes are inseverable and that the sections in which they appear, as well as the sections conferring jurisdiction on this Court, must be invalidated. *See Allen v. Carmen,* 578 F.Supp. 951 (D.D.C., 1983), and *United States v. Sutton,* —— F.Supp. ——, No. 82-C-1069-BT (N.D.Okl. Apr. 4, 1984).

We also are not persuaded by the reference to the veto provisions in the legislative history which describe their operation. Such descriptions are not helpful in determining what Congress would have intended had it known the legislative vetoes were invalid. *Consumer Energy Council of America v. F.E.R.C., supra,* 673 F.2d at 442. We therefore conclude that it is not evident that Congress would have declined to enact the EPAA and EPCA without the legislative veto provisions.

We reach this conclusion because, contrary to Gulf's contention, the question is not whether Congress would have enacted these *exact* statutes had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all.

We must next determine if what remains in the Acts is "fully operative as a law." *Buckley v. Valeo, supra,* 424 U.S. at 109, 96 S.Ct. at 677. The legislative veto provision of the EPAA appears in Section 4(g)(2).[25] Once

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[25] The veto provision of Section 4(g)(2) of the EPAA is as follows:

> Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment

the veto is severed, the remainder of Section 4(g)(2) gives the President limited decontrol authority over crude oil, residual fuel oil, or any refined petroleum product after making specific findings that regulation of such oil or product is no longer necessary under the Act, that no shortage exists and that exempting such oil or product will not have an adverse impact on the supply of other oil or products. Without the veto, Section 4(g)(2) is "fully operative as a law." *Id.*

Similarly, the legislative veto provisions contained in the EPCA, once removed, leave the remainder of the Act "fully operative as a law." *Id.* In fact, the hard-fought compromise between the Executive and Congress over pricing and decontrol, which Gulf contends demonstrates the inseverability of the vetoes, is maintained after severance. Without the vetoes, Sections 401 and 455 of the EPCA resemble "report and wait" procedures specifically approved in *Chadha.*[26] *I.N.S. v. Chadha, supra,* 103 S.Ct.

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to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; *except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.* (Emphasis Added)

[26] Either House of Congress could unilaterally veto an amendment proposed by the President by following the procedures for congressional review contained in § 551 of the EPCA. When the legislative veto in § 551(c)(1) is excised from the section a fully workable "report and wait" procedure is preserved. The President could still propose an amendment to the Congress, but Congress would be able to prevent its effectiveness by passing legislation contrary to the amendment within specified time periods. Thus, Congress would still retain the opportunity to review Presidential proposals, but would only be able to disapprove of such actions through use of the constitutional legislative process. Such a procedure is not only workable, but preserves to the greatest extent possible the compromise between Congress and the Executive intended in the legislation.

at 2776 n. 9, and *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed.2d 479 (1941).

From the beginning of price controls under federal statutes and regulations, courts have resolved challenges to their constitutionality. *See, Amalgamated Meat Cutters and Butcher Workers of North America v. Connally*, 337 F.Supp. 737 (D.D.C. 1971); *Consumers Union of U.S., Inc. v. Sawhill*, 525 F.2d 1068 (Em.App. 1975). These challenges have escalated enormously since the enactment of the EPAA and EPCA. *See, Condor Operating Co. v. Sawhill*, 514 F.2d 351 (Em.App.), *cert. denied*, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975); *Cities Service Co. v. F.E.A.*, 529 F.2d 1016 (Em.App. 1975), *cert. denied*, 426 U.S. 947, 96 S.Ct. 3166, 49 L.Ed.2d 1184 (1976), the authorities therein, and their progeny. The scope of these attacks has been unreasonably broad. The statutes have been upheld because "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921). As the program under the law winds down in the wake of decontrol, this latest and broadest attack also is without merit.

Therefore, we conclude that the unconstitutional legislative veto provisions of the EPAA and EPCA are severable, leaving the remainder of the Acts intact and with no effect on this Court's jurisdiction. Gulf's Motion to Dismiss the Cross-Appeal is DENIED.

Computation of Maximum Allowable Price in Determining Overcharges

Gulf contends that the District Court did not determine that its prices charged to Dyke exceeded the "maximum allowable price." Such a finding, Gulf states, is necessary before concluding that overcharges have occurred. "Maximum allowable price" is defined in the regulations as:

> ". . . the weighted average price at which the covered product was lawfully priced on May 15, 1973, computed in accordance with the provisions of [10 C.F.R.] § 212.83(a), plus increased product costs and increased non-product costs incurred between the month of measurement and the month of May 1973." 10 C.F.R. § 212.82.

See also, Wellven, Inc. v. Gulf Oil Corp., 731 F.2d 892 (Em.App. 1984).

Gulf cites our decision in *Longview Refining Co. v. Shore*, 554 F.2d 1006 (Em.App. 1977), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977), as requiring specific findings by the district court establishing the existence of overcharges in a sum certain before a plaintiff may recover. 554 F.2d at 1012. While such specific findings are indeed required by *Longview*, the findings which supposedly established the maximum allowable price in *Longview* were "defectively general and all-inclusive." *Id.* at 1018. We hold that the District Court's findings and method of computing overcharges in this case, although erroneous as to class of purchaser base price for reasons hereafter to be discussed, were otherwise sufficient under the regulations.

The District Judge used the following formula to compute overcharges:

> "The proper method in this case for calculating the overchages is to subtract the court-ordered May 15, 1973 prices to Dyke from the May 15, 1973 prices imputed to Dyke based on *Platt's Oilgram*. If Gulf did not actually pass through its full cost increment to Dyke in a month, the cost increment difference is to be subtracted from the overcharge calculated on May 15 prices. The difference shall be multiplied by the volume of each grade of gasoline sold to Dyke in each month . . . ." FFCL, Record at Vol. 11, Tab. 147, p. 19.

Using this formula, the parties then stipulated the amount of the overcharges. *Id.* at p. 20.

This method employs both May 15, 1973 base prices and Gulf's stated increased costs to arrive at the maximum allowable price. Using the figures provided by Gulf, the district court was able to determine the costs Gulf elected to pass through each month [27] as well as the dates on which Gulf did not charge Dyke the full amount of increased costs available.[28] Gulf was given credit for these undercharges to Dyke in computing total overcharges. Thus the findings sufficiently found all of the elements of the maximum allowable price calculations as a basis for determining that sales exceeded the "maximum allowable prices" permitted under the governing Refiner Price Rule.

Prejudgment Interest

We hold that this case is not an appropriate one in which to award prejudgment interest. Accordingly, we need not reach the question of whether prejudgment interest may ever be awarded in an overcharge case under the EPAA. Recently, we declined to award prejudgment interest in two cases because the amount claimed was not for a "liquidated or readily liquidatable sum." *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1410 (Em.App.), *cert. denied*, —— U.S. ——, 104 S.Ct. 278, 78 L.Ed.2d 258 (1983); *Zahir v. Shell Oil Co.*, 718 F.2d 1567, 1573 (Em.App. 1983). In addition, prejudgment interest is not appropriate in this case because the ultimate amount of the overcharge was the "subject of great uncertainty," [29] requiring extensive testimony and arguments from counsel before the court could select even a method for calculating the alleged overcharges.

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[27] Record at Vol. 17, Tab 292.

[28] *Id.*

[29] *Eastern Air Lines, supra*, at 1410.

Following our decision in *Eastern Air Lines, supra,* Gulf filed a motion to amend the Findings of Fact and Conclusions of Law to delete the award of prejudgment interest.[30] In an Order dated August 24, 1983, Judge Panner denied the motion, stating only, "The motion to deny an award of prejudgment interest is DENIED because Magistrate Juba was able to determine appropriate amounts with certainty. Therefore *Eastern Air Lines* does not control." [31] While it is true that the magistrate was able to ultimately determine an amount certain to be applied as prejudgment interest following the judge's ruling, certainty in calculating interest on a definite sum is not what *Zahir* and *Eastern* require. Rather, we again hold that in this case, where the amount claimed to be due varied and was uncertain, it is "inequitable and unjust" to award prejudgment interest.[32]

Attorney's Fees

The district judge awarded Dyke $750,000 in attorney's fees,[33] finding that our recent decision of *Eastern Air Lines, supra,* was not controlling. In *Eastern Air Lines,* we conducted an extensive study of § 210(b) of the ESA [34] and the limitations on a judge's discretion in awarding attorney's fees imposed by that section:

> ". . . [T]o deprive the court of its discretionary power to award treble damages and attorney's fees, the defendant making the overcharge must prove that (1) the overcharge was not intentional, and (2)

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[30] Record at Vol. 16, Tab 254.

[31] Record at Vol. 16, Tab 256, p. 2.

[32] *Eastern Air Lines, supra,* at 1410.

[33] Record at Vol. 11, Tab 161.

[34] Although the district judge stated that "TECA was not required in [*Eastern Air Lines*] to carefully analyze the language of the statute authorizing attorneys' fees" (Record at Vol. 11, Tab 155, p. 3), we believe our analysis in *Eastern* was thorough and is controlling.

the overcharge resulted from a *bona fide* error notwithstanding (3) the maintenance by the defendant of procedures reasonably adapted to the avoidance of such error.

"In the absence of such proof by the defendant the court in its discretion may award treble damages and attorney's fees if it finds the overcharge was intentional or resulted from reprehensible or criminal conduct, or lack of procedures reasonably adapted to the avoidance of erroneous overcharges, or bad faith, or where required by equity and the ends of justice." *Eastern Air Lines, supra,* at 1412; second paragraph *quoted in Wellven, Inc. v. Gulf Oil Corp., supra.*

The Findings of Fact and Conclusions of Law contain the express finding that any overcharges by Gulf were not intentional. ". . . In light of the circumstances and lack of guidelines at the time Gulf's decision was made, I find that the overcharges were not intentional." FFCL, Record at Vol. 11, Tab. 147, pp. 21-22.[35]

In view of the findings made by the district judge that the overcharge was not intentional and, although not in the precise language"[36] of § 210(b), the finding that Gulf maintained "procedures reasonably adapted to the avoidance" of overcharge,[37] as well as our conclusion upon examination of the record that any overcharges were the result of a *bona fide* error, we hold that it was plain error

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[35] *See also,* Record at Vol. 25, Tab 329, p. 1158, l. 17. In *Longview Refining Co. v. Shore, supra,* at 1014, n. 20 (Em.App. 1977), this Court warned, "Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. *Boyce Motor Lines v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952);" also *Standard Oil Co. v. D.O.E.,* 596 F.2d 1029, 1065, n. 87 (Em. App. 1978).

[36] *Eastern Air Lines, supra,* at 1412.

[37] *Id.*

to award any attorney's fees in this case. In any event, the amount of attorney's fees awarded here was so excessive as to constitute a clear abuse of discretion.[38]

Plaintiff Fletcher's Standing to Sue

Gulf claims that Plaintiff Fletcher has no standing to sue under ESA § 210 for overcharges because Fletcher was an indirect purchaser from Gulf. The contract for sale of gasoline was between Gulf and Tesoro Petroleum Corporation. Tesoro then resold the gasoline to Fletcher.[39] Section 210(b) of the ESA authorizes suits for overcharges ". . . against any person renting or selling goods or services *who is found to have overcharged the plaintiff.*" (Emphasis added) We hold that, on the basis of our examination of the record and as a matter of law,

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[38] *Id.* The attorney's fees awarded in this case were grossly excessive and a clear abuse of the judge's discretion. The last-submitted affidavit of plaintiff's counsel in support of the motion for attorney's fees included in the record reflects a requested *bonus* payment of $84,600.00. The requested fees were $397,641.60 and stated expenses were $17,289.76. The total of submitted fees, expenses and bonus through March 10, 1983 was $499,531.36. Record at Vol. 11, Tab 144. Judge Panner made an award of attorney's fees in the amount of $750,000.00, *supra*, and Record at Vol. 11, Tab 161, representing a bonus payment of $250,468.84 more than the total of fees, expenses and bonus in the affidavit. Including the bonus of $84,600.00 which was requested in the affidavit, the total bonus to plaintiffs' attorneys was $335,068.64. Additionally, the itemized billing statements submitted by plaintiffs' counsel include substantial charges made for the *Amici Curiae* brief filed on behalf of these plaintiffs on January 12, 1983 in *Eastern Air Lines v. Atlantic Richfield Co., supra*, before this Court. The *Amici* brief urged the same positions on the prejudgment interest and attorney's fees issues as plaintiffs have argued in the present case. In *Eastern Air Lines*, these positions were rejected by this Court.

[39] Fletcher paid Tesoro Gulf's sales price plus a fixed markup of $.00375 per gallon. FFCL, *supra*, at 14. We are not convinced that the "unique relationship" the district court found between Gulf, Tesoro and Fletcher (*Id.* at 12-15) requires a determination that Fletcher was anything other than an indirect purchaser from Gulf.

Fletcher was an indirect purchaser from Gulf. Indeed, Plaintiffs' counsel classified Fletcher in this statement to Judge Panner: "That's a question of whether Fletcher is entitled as a subjobber and has standing to bring this matter in the first place." Record at Vol. 21, Tab. 325, p. 233, l. 21.

Fletcher was an indirect purchaser with no standing to sue for overcharges, and we so hold. *See, Palazzo v. Gulf Oil Corp.*, 4 Energy Mgt. ¶ 26,448 (Em.App. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1424, 79 L.Ed.2d 749 (1984); *Arnson v. General Motors Corp.*, 377 F.Supp. 209 (N.D. Ohio 1974). When Congress created the Temporary Emergency Court of Appeals as "a court of special and limited jurisdiction"[40] which should "strictly construe [its] statutory grants of jurisdiction,"[41] it did not authorize recovery of overcharges by indirect purchasers. The EPAA expired by its own terms in Septembert 1981. We will not expand the statutes while exercising our jurisdiction under the savings clause. 15 U.S.C. § 760g.

Statute of Limitations

In addition to our foregoing holding that Plaintiff Fletcher does not have standing to sue Gulf, we hold that any claim by Fletcher would also be barred by the applicable statute of limitations. Because the ESA, EPAA and EPCA do not contain specific statutes of limitation, we must apply the most closely analogous state statute of limitation to causes of action arising under the Acts. *Ashland Oil Co. of California v. Union Oil Co. of California*, 567 F.2d 984 (Em.App. 1977), *cert. denied*, 435

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[40] *Texaco, Inc. v. D.O.E.*, 616 F.2d 1193, 1196 (Em.App. 1979), and authorities cited therein.

[41] *United States v. Cooper*, 482 F.2d 1393, 1398 (Em.App. 1973), approved by the Supreme Court in *Bray v. United States*, 423 U.S. 73, 96 S.Ct. 307, 309, 46 L.Ed.2d 215 (1975).

U.S. 994, 98 S.Ct. 1644, 56 L.Ed.2d 83 (1978); *Colorado Petroleum Products Co. v. Husky Oil Co.*, 646 F.2d 555 (Em.App. 1981).

The district judge applied the Oregon six-year statute of limitations to Plaintiff Fletcher.[42] We hold that this was plain error and that the Washington two-year statute of limitations[43] should be applied to Fletcher.

Plaintiff Fletcher is a Washington resident.[44] Fletcher purchased 60 percent of its gasoline in Washington and 40 percent in Oregon.[45] All of Fletcher's gasoline was sold in Washington.[46] Gulf is a Pennsylvania corporation.[47] Under Oregon's "borrowing statute," Or.Rev.Stat. § 12.260, when two nonresidents bring a cause of action in an Oregon court which arose in another state, the Oregon court will apply the foreign state's statute of limitations if it is shorter than Oregon's.

The district judge held that although the "borrowing statute" might be applicable, his decision should also be governed by general Oregon choice of law standards.[48] Under Oregon law, when more than one state has an interest in a controversy, the law of the state which has the "most significant relationship" to the controversy will be applied.[49] The district judge found that Washington had no true interest in the controversy.[50] We disagree.

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[42] Or.Rev.Stat. § 12.080 (1983).

[43] Wash.Rev.Code § 4.16.130 (1962).

[44] FFCL, Record at Volume 11, Tab 147, App. A, p. 2.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 4.

[49] *Id., citing Fisher v. Huck*, 50 Or.App. 635, 624 P.2d 177 (1981).

[50] *Id.* at 6.

Plaintiff Fletcher is a Washington resident. Most of the gasoline was purchased in Washington, and all of it was sold there. We hold that, as between Washington and Oregon, Washington had the more significant relationship to the controversy. Oregon's "borrowing statute" is applicable, and the shorter Washington two-year statute of limitations should apply to Fletcher.

The district judge also declined to apply Washington's two-year statute of limitations because he found that "a two-year limitation places a bar on recovery inconsistent with federal policy."[51] We have already held that "[a] two-year statute is certainly not inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio.*" *Johnson Oil Co. v. DOE*, 690 F.2d 191, 196 (Em.App. 1982). *See also, Ashland Oil Co., v. Union Oil Co. of California, supra; Siegel Oil Co., v. Gulf Oil Corp.*, 701 F.2d 149, 152 (Em.App. 1983).

Therefore, Washington's two-year statute of limitations should be applied to Plaintiff Fletcher. Fletcher's claim was brought in 1977 for overcharges beginning in 1974. In a case such as this, where any overcharges incurred resulted from an initial improper base price, the statute of limitations begins to run from the date of the first overcharge. *Western Mountain Oil, Inc. v. Gulf Oil Corp.*, 726 F.2d 765 (Em. App. 1983); *Fleetwing Corp. v. Mobil Oil Corp.*, 726 F.2d 768 (Em.App. 1983); *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898 (Em.App. 1984), *rehearing en banc denied*, April 10, 1984. Fletcher's claim for overcharges is barred by Wash. Rev. Code § 4.16.130.

Passing on Defense

Gulf claims that those overcharges which were passed through to the Plaintiffs' service station customers should

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[51] *Id.*

not be refunded because the Plaintiffs' suffered no economic injury from overcharges which were passed down the stream of commerce.[52] Although such use of a passing on defense has been denied because of difficulty of proof in the past,[53] Gulf argues that in determining the sum on which to award prejudgment interest, the trial court sufficiently found the amounts which the Plaintiffs had passed through to their customers, and therefore, no difficulty of proof problem exists which would prevent the use of passing on as an affirmative defense.[54]

In *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 609 F.2d 497 (Em.App. 1979) ("ARCO I"), this Court refused to allow a passing on defense in an overcharge action. In ARCO I, we held that, in order to be excepted from the general rule disallow g the affirmative pass on defense,[55] the defendant must establish that a pre-existing functional equivalent of a cost-plus contract[56] existed in which Plaintiffs would necessarily pass through any overcharge received, and that the effect of the overcharge to Plaintiffs must be capable of determination in advance. *Id.* at 498.

Therefore, Gulf's assertion that the overcharges passed on by Plaintiffs were determined by the magistrate at trial, thus obviating any difficulty of proof problem, misses the point. In order for Gulf to successfully assert the passing on defense, the impact of any overcharges made

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[52] Gulf's Brief at 21.

[53] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); *Eastern Air Lines v. Atlantic Richfield Co.*, 609 F.2d 497 (Em.App. 1979) ("ARCO I").

[54] Gulf's Brief at 21-23.

[55] *See, Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

[56] *Id.; In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979).

by it to plaintiffs must be determinable *before* the overcharges occurred. Such was not the case here. There was no certainty about how plaintiffs would price their gasoline at the service station in response to the amount charged by Gulf. Because the exception to the general rule disallowing passing on as a defense is narrow, we hold that Gulf may not use the passing on defense in this case where no preexisting functional equivalent of a cost-plus contract existed.

Class of Purchaser Determination

Gulf asks us to overturn the district judge's order denying Gulf's motion to reopen the trial on the class of purchaser issue.[57] Gulf sought to introduce additional evidence to show that the San Francisco Bay area, where Armour is located, is a distinct market from the Seattle-Tacoma-Portland area, where Plaintiffs are located, and thus it would be inappropriate to use the same classification and base price for Armour and the Plaintiffs.

Judge Panner denied the motion to reopen the trial during a telephone conference on May 12, 1982,[58] sixteen months before a final judgment was entered on September 12, 1983. It is apparent from the transcript of that conference that the judge had not fully considered the memorandum and affidavit accompanying Gulf's motion.[59] Although the grant or denial of a motion to reopen the trial is within the district judge's discretion,[60] we hold that the refusal to reopen the trial in this case was an abuse of discretion and clear error.

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[57] Gulf's Brief at 24.

[58] Record at Vol. 19, Tab 323.

[59] *Id.* at 3.

[60] *Sanders v. Int'l. Ass'n. of Bridge Workers*, 546 F.2d 879 (10th Cir. 1976).

The district judge's ruling on the motion to reopen the trial without considering the supporting documents filed by Gulf was an abuse of discretion. *See, Sertic v. Cuyahoga Counties Carpenters Dist. Council*, 459 F.2d 579 (6th Cir. 1972). The Pretrial Order in this case was extremely vague as to the issues framed for trial,[61] and we hold that Gulf did not have a full and fair opportunity to present evidence on its most similar existing class of purchaser after the ruling denying the use of *Platt's Oilgram* as a base price determinant. Therefore, we reverse and remand the district judge's ruling on the motion to reopen trial and direct him to consider Gulf's evidence and make a new determination of the proper class of purchaser and base price for the plaintiffs.

CONCLUSION

1. Gulf's Motion to Dismiss is DENIED.

2. The district court's Order determining the proper class of purchaser for Plaintiffs is REVERSED and REMANDED with directions to reopen the trial to consider Gulf's evidence on the class of purchaser issue. Any award of overcharges must be recalculated to reflect any change in base price.

3. The Orders of the district court granting attorney's fees and prejudgment interest are REVERSED.

4. That portion of the judgment of the district court awarding overcharges to Plaintiff Fletcher is REVERSED.

The judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

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[61] Although the Pretrial Order contained references to the Armour class of purchaser, the record reflects that the idea of using the Armour base price for Plaintiffs was first seriously considered at trial.

CHRISTENSEN, Judge, concurring:

The prevailing opinion has my full concurrence but I wish to add a few words to clarify an unaddressed misconception relating to the wording of the controlling statute which might otherwise appear on its face to carry weight.

The contention has been made that if, as held in *Eastern Airlines*, a court's discretion to award attorney's fees under section 210(b) of the ESA is limited to cases of willful overcharges, mention of "costs" would not have been included in the phrase "reasonable attorney's fees and costs," since under the general rule taxable costs are recoverable by prevailing parties in any event. The contention fails to recognize the distinction between taxable costs awardable as of course to a prevailing party apart from adjudged liability and "reasonable attorney's fees and costs" as a liability authorized in departure from the American Rule as to attorney's fees because of certain recognized equitable considerations or, as here, by express statutory provision under specified conditions. If the term "costs" in line with the argument had been eliminated from the phrase, a more plausible contention could have been made that even taxable costs could not be recovered at all in case of willful overcharges whereas they would have been if the overcharges were not willful. Congress did not need to invite the latter unreasonable construction by omitting the mention of costs in connection with its reference to attorney's fees. It plainly indicated its intention to the contrary and it would be quite unreasonable to hold that in so doing it granted carte blanche discretion to award "attorney's fees and costs" in disregard of the limitations it specified merely because taxable costs otherwise may have been awardable to a prevailing party without reference to those limitations.

ZIRPOLI, Judge, concurring in part and dissenting in part:

While I am in accord with the opinion of the majority on the issues of jurisdiction, remand for further trial on the class of purchasers determination, and the statute of limitations applicable to Fletcher, I cannot agree with the majority's conclusions on the issues of prejudgment interest, attorney's fees, and Fletcher's standing. Accordingly, I must respectfully dissent.

A. *Prejudgment Interest*

The majority concludes that it was improper for the district court to award prejudgment interest in this case because the amount of overcharges by Gulf were not certain until after trial. The majority relies on *Zahir v. Shell Oil Co.*, 718 F.2d 1567, 1573 (Em.App. 1983), and *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1410 (Em.App.), *cert. denied*, —— U.S. ——, 104 S.Ct. 278, 78 L.Ed.2d 258 (1983). Neither of these cases bars an award of prejudgment interest in the present case. Because I find no abuse of discretion in the trial court's award of prejudgment interest in this case, I would affirm that portion of the decision.

"In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties." *Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971). The statute authorizing suits to collect overcharges is remedial in nature and designed to compensate those who have been overcharged for the losses that they sustained as a result of the overcharges. *See Minnesota v. Standard Oil Co.*, 516 F.Supp. 682, 687 (D.Minn. 1981); *Ashland Oil Co. of California v. Union Oil Co.*, 567 F.2d 984, 990 n. 12 (Em.App. 1977). An award of prejudgment interest to compensate plaintiffs for the loss

of the use of money is consistent with the congressional purpose of this statute.

The relative equities of the parties in this case do not tip so strongly towards Gulf as to render the award of prejudgment interest to plaintiffs an *abuse of discretion.* While it may be true that Gulf had financial difficulties in the Pacific Northwest where plaintiffs operate, this is not a proper factor to consider in deciding whether or not to award prejudgment interest, nor does it appear that the majority considers this to be a relevant consideration, since it is not mentioned in the opinion. What is a relevant factor, is that Gulf conceded its use of spot purchase prices reported in *Platt's Oilgram* for establishing plaintiffs' base price was unjustified. In deciding to award prejudgment interest, the trial court expressed its "concern that there wasn't a more serious effort [by Gulf] . . . to correct the overcharge." (Tr. 1159). Although the trial court did find that Gulf's overcharges were not intentional, and so did not award treble damages, I think that it was well within its discretion to award prejudgment interest to plaintiffs on overcharges which they did not pass through to their customers.

The majority bases its reversal of the award of prejudgment interest on the fact that the principal amount of the overcharge was the "subject of a great amount of uncertainty" because the parties were in disagreement as to what was the most appropriate class of purchasers for plaintiffs. Until the trial court had ruled on the appropriate class of purchasers question, the principal amount of overcharges could not be computed. Because this uncertainty as to a legal issue is not the type which is traditionally held to preclude an award of prejudgment interest, I would defer to the trial court's determination that the relative equities of the parties, as well as the remedial purpose of the statute, warranted the award. Neither *Zahir* or *Eastern Airlines* dictates otherwise.

In both *Zahir* and *Eastern*, this court affirmed the trial court's *denial* of prejudgment interest. In *Zahir* it was held that "the trial court did not abuse its discretion" in declining to award prejudgment interest where the plaintiff's claim was "not for a liquidated or readily liquidatable sum." 718 F.2d at 1573. In that case, the plaintiff's claim upon which he sought prejudgment interest was for *lost profits* due to the defendant's failure to supply him with gasoline. A claim for lost profits is a highly speculative type of injury which must be estimated, rather than one which is capable of determination with mathematical precision. It has long been the rule that awards of prejudgment interest are not given on claims of injury which are not of the type capable of reasonably precise determination. Thus, the refusal of the trial court to award prejudgment interest in *Zahir* was clearly correct.

In the present case, on the other hand, the injury suffered by plaintiffs was one capable of mathematical computation. The "uncertainty" involved was due to the parties' dispute as to which was the proper class of purchasers for determining plaintiffs' base price. Once the trial court had made its ruling on the class of purchasers question, the principal amount of the overcharge was one capable of mathematical computation.[1]

Courts have traditionally had discretion to award prejudgment interest in cases where the damages are liqui-

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[1] A great deal of time was spent in determining what portion of the overcharges plaintiffs had passed through to their customers. The trial court had ruled that it would be inequitable to award plaintiffs prejudgment interest on overcharges that they had passed through, since to the extent of such pass-throughs, plaintiffs had not been deprived of the use of the money. Gulf should not be heard to complain about any "uncertainty" involved in determining the amount passed through, since this equitable determination to limit the award of prejudgment interest on overcharges was to *Gulf's* benefit.

dated or capable of mathematical computation. Thus, it has been said that "interest is allowed on all claims that are liquidated or readily ascertainable by mathematical computations . . . in other words where it is not necessary to rely upon opinion or discretion." *Nelse Mortensen & Co. v. United States*, 305 F.Supp. 470, 471 (E.D. Wash. 1969) (quoting from *Caterpillar Tractor v. Collins Machinery Co.*, 286 F.2d 446 (9th Cir. 1960)). A disputed claim is not rendered unliquidated or incapable of precise valuation merely because the parties disagree as to the proper method for calculating the principal amount due. Thus, in *American Enka Co. v. Wicaco Mach. Corp.*, 686 F.2d 1050, 1057 (3rd Cir. 1982), where the parties were in disagreement over the correct date to be used for an award of the market value of goods lost by a bailee, the court held that the dispute concerned a liquidated amount "capable of ascertainment with mathematical precision" (once it was determined which was the proper date for purposes of valuing the property) and the trial court had discretion to award prejudgment interest. *See also, Mortensen*, 305 F.Supp. at 471 ("Mere difference of opinion as to amount is, however, no more reason to excuse him from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse." (emphasis deleted; quoting from *Prier v. Refrigeration Engineering Co.*, 74 Wash. 2d 25, 442 P.2d 621, 627 (1968).)

Nor does *Eastern Airlines* dictate any deviation from the traditional principle that the trial court has *discretion* to award prejudgment interest on sums which are liquidated or "capable of ascertainment with mathematical precision." *American Enka*, 686 F.2d at 1057. In *Eastern*, as noted above, the trial court did *not* award prejudgment interest, and this decision was affirmed. In the present case, on the other hand, the trial court, in its discretion, did award prejudgment interest. The majority, with no discussion of the relative equities of the

parties or the remedial purpose of the statute, holds that the trial court abused its discretion in awarding prejudgment interest in this case.

The majority apparently relies on the broad language in *Eastern* that "prejudgment interest is not available where the amount of damages claimed to be due is uncertain." 712 F.2d at 1410. However, as noted above, it is not every type of "uncertainty" which will preclude an award of prejudgment interest. An examination of the case cited in *Eastern* in support of the quoted language shows the relevant type of uncertainty to be that due to inherent difficulty in measuring the extent of injury, such as that involved in *Zahir*. The case cited in *Eastern*, *Belcher v. Birmingham National Bank*, 488 F.2d 474, 478 (5th Cir. 1973), was an action to recover the value of services rendered. In determining the reasonable value of services rendered, the court must rely upon "opinion or discretion" to *estimate* the principal amount to be awarded. *Mortensen*, 305 F.Supp. at 471. Such an estimate necessarily means that the amount is not "readily ascertainable by mathematical computations." *Id.* Thus, the authority cited in *Eastern* does not support any broad rule that a dispute as to the legal issue of the most appropriate class of purchasers for plaintiffs will preclude an award of prejudgment interest. Furthermore, any such broad rule would be contrary to the remedial purposes of the statute. Thus, I do not read *Eastern* as holding that the trial court would have abused its discretion *if it had* awarded prejudgment interest in that case. Rather, as was made clear in *Zahir*, the trial court had discretion to deny prejudgment interest in *Eastern*, depending upon the equities, and there was no indication that it had abused its discretion in that case.

In the present case, the trial court considered the equities and the remedial purposes of the statute and concluded that an award of prejudgment interest was appropriate. I find no reason to overturn this decision.

B. *Attorney's Fees*

I must dissent from the majority's determination that it was "plain error" to award attorney's fees in this case. While I find the majority opinion somewhat ambiguous as to the basis for its holding on this question, I assume that the opinion is intended to hold that an award of attorney's fees is *never* authorized under section 210(b) of the Economic Stabilization Act if the defendant proves that the overcharge was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." 12 U.S.C. § 1904 note. I do not think that a close examination of the statute supports this interpretation.

As a preliminary matter, it should be noted that although the trial court did expressly find that the overcharges in this case were not intentional, there was no express finding that they were the result of a "bona fide error notwithstanding the maintenance of [adequate procedures designed to prevent such errors]." The majority's statement that the "finding that Gulf maintained 'procedures reasonably adapted to the avoidance' of an overcharge" was not in the "precise language" of the statute (*see* opinion at 807) is somewhat misleading, since not only was such a finding not in the "precise language" of the statute, it was not made *at all*. Nevertheless, since I think it is clear that such a finding was impliedly made, I do not take issue with the majority's conclusion that Gulf had proven that the overcharges were the result of a bona fide error. I make this observation only to make absolutely clear that this court was not under the erroneous impression that the trial court had made *some* express finding, even though not in the "precise language" of the statute. The basis for my conclusion that the trial court had made an implied finding that Gulf had made the overcharges in good faith notwithstanding the maintenance of adequate procedures

is that the trial court went to the trouble of deciding a difficult statutory interpretation question as to whether attorney's fees were awardable even in cases where treble damages are not. Treble damages are clearly not awardable under section 210(b) where the defendant proves that the overcharge was unintentional and the result of a bona fide error notwithstanding the maintenance of adequate procedures. If the trial court had not made an implied finding that Gulf's overcharges were the result of a good faith error, it would not have been necessary for it to decide the statutory interpretation question.

Unlike the majority, I agree with the district court's conclusion that section 210(b) authorizes an award of attorney's fees in this case even though Gulf had satisfied the court that its error was unintentional and the result of a good faith error. Section 210(b) provides, in pertinent part, as follows:

> [T]he court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge . . . .

12 U.S.C. § 1904 note.

Upon close examination of the statute, the district court concluded that "the language of exception beginning with the word 'except' modifies only the language that follows the word 'plus.'" Thus, the court concluded that it had discretion to award attorney's fees in this

case. I agree. Under the interpretation of this statute adopted by the majority, the award of *costs*, as well as attorney's fees, would not be authorized in cases where the defendant proves that the overcharge was unintentional. Such an interpretation clearly would run counter to the remedial purpose of the statute and to Congress' intent that private actions should play a "critical" role in the enforcement of the price regulations. *See Ashland Oil*, 567 F.2d at 990 n. 11. While the opinion in *Eastern* does include dicta which supports the majority's interpretation, the holding in that case was merely that the trial court had not erred in *denying* an award of attorney's fees and treble damages, and there is no indication that the court in that case was called upon to closely examine the statute.

Thus, I conclude that section 210(b) authorizes the court, in its discretion, to award "attorney's fees and costs" to a successful plaintiff in an action to recover overcharges even in cases where the defendant makes a showing that would preclude an award of treble damages. Since there is no indication that it would be an abuse of discretion to award any amount of attorney's fees, I respectfully dissent.[2]

C. *Fletcher's Standing*

Although I concur in the majority's holding that the two-year Washington statute of limitations bars Fletch-

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[2] Since I concur in the holding that this case should be remanded to permit Gulf to introduce new evidence on the class of purchasers issue, I express no opinion as to whether the amount of attorney's fees awarded in this case was reasonable. I would note, however, that plaintiffs are entitled to recover a "reasonable fee" based upon the "prevailing market rates" in the community, and are not restricted to recovery of the fees *actually billed*. *Blum v. Stenson*, —— U.S. ——, ——, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). It appears that a substantial portion of the "bonus" referred to by the majority (*see* opinion note 38) may be attributable to the fact that the fees actually billed plaintiffs were lower than the market rate.

er's claims, and so do not believe it is necessary for the court to rule on the issue of Fletcher's standing, because the majority has expressed its views on this issue, I feel constrained to state my views.

Fletcher was a retail seller of gasoline under the Gulf brand in Washington and Oregon until Gulf withdrew its brand from the region in 1974. Gulf continued to supply gasoline to Fletcher and the other plaintiffs after 1974, on an unbranded basis, as required by the mandatory allocation regulations. The gasoline sold by Fletcher under the Gulf brand was purchased under a cost-plus contract between Fletcher and Tesoro Petroleum Corporation. Tesoro, in turn, had a gasoline supply contract with Gulf. Thus, on a superficial basis, it might appear that Fletcher was not a direct purchaser from Gulf; however, an examination of all the facts supports the district court's finding that "the sale [by Gulf] in substance was to Fletcher." Fletcher had substantial direct dealings wtih Gulf. Fletcher took delivery of the gasoline directly from Gulf. Gulf established a procedure by which Fletcher transmitted its credit card slips directly to Gulf, which in turn would credit Tesoro's account. Gulf included Fletcher in meetings held with all of Gulf's branded jobbers, and notices of price changes came directly from Gulf to Fletcher, not through Tesoro. Prior to the execution of both the Gulf-Tesoro and the Tesoro-Fletcher contracts, Gulf was informed that Fletcher would be the party receiving and retailing the gasoline, and Gulf representatives investigated Fletcher's station locations, and explained the ramifications of Fletcher's anticipated use of the Gulf brand. The contract between Tesoro and Fletcher provided that Fletcher would pay Gulf's price plus a fixed markup of $.00375 per gallon. When Gulf applied to the DOE to withdraw as a supplier from certain West Coast locations, Gulf referred to its supply obligation to "Tesoro Fletcher."

Section 210(b) of the ESA authorizes suits for overcharges ". . . against any person . . . who is found to

have overcharged the plaintiff." This statute has been interpreted as limiting standing in overcharge suits to "direct purchasers." Thus, in *Arnson v. General Motors Corp.*, 377 F.Supp. 209, 211-12 (N.D. Ohio 1974), the court held that a purchaser of an automobile from a dealer did not have standing to sue the manufacturer for alleged overcharges by the manufacturer to the dealer. In reaching this conclusion, however, the court noted "there is no allegation that [the defendant dealt directly with the plaintiff in any manner. Thus absent any privity between plaintiff and defendant, it is apparent that defendant is not a seller within the scope of the Act as it relates to this transaction." 377 F.Supp. at 212. Furthermore, the court in *Arnson* specifically found that there was no agency relationship between the manufacturer and the dealer by which price increases of the manufacturer were automatically passed on to the ultimate consumer. In fact, such price increases were not passed on by the dealer in five percent of the cases. *Id.* at 214. In the present case, on the other hand, there were substantial direct dealings between Gulf and Fletcher, and the price paid by Fletcher was directly tied to the price charged by Gulf through a cost-plus contract. Thus, *Arnson*, relied on by the majority, by no means establishes that Fletcher lacks standing to sue Gulf for overcharges.

Nor does *Palazzo v. Gulf Oil Corp.*, the other case cited by the majority, stand for the proposition that an "indirect" purchaser such as Fletcher has no standing to sue. In *Palazzo*, the plaintiff was an officer and stockholder of the entity which made the purchases from the defendant. Thus, the overcharges by Gulf had no direct and mathematically certain impact on *Palazzo*. Overcharges by Gulf in the present case, on the other hand, had a direct and ascertainable impact on Fletcher, due to the cost-plus contract between Tesoro and Fletcher.

It is the general rule under the antitrust laws that an indirect purchaser has no standing to sue, yet there is

an exception to this rule which permits such suits where the plaintiff makes purchases under a cost-plus contract. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct. 2061, 2070, 52 L.Ed.2d 707 (1977); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163-64 (5th Cir. 1979). I see no reason why such an exception should not also exist for suits to recover overcharges under section 210(b). This is especially true in view of Congress' intent that private suits to recover overcharges would serve both remedial and policing functions. To hold that Tesoro, not Fletcher, is the only party which would have standing to sue for these overcharges would not serve any remedial purpose, since Tesoro was not harmed by Gulf's overcharges. Tesoro received its $.00375 per gallon no matter what Gulf charged. Nor would such a holding advance the enforcement purposes of the statute, since Gulf would be permitted to raise the defense that Tesoro passed on all of Gulf's overcharges to Fletcher. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S.Ct. 2224, 2232, 20 L.Ed.2d 1231 (1968); *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 609 F.2d 497 (Em. App. 1979); and majority opinion at 809. Tesoro obviously would have no motivation to bring suit for overcharges by Gulf for which it could not recover due to the passing-on defense.

D. *Remand*

In joining the majority ruling that the case be remanded to reopen the trial to consider Gulf's evidence on the class of purchasers issue, I am satisfied that the court expresses no view on what the proper class of purchasers will ultimately be found to be. I do not understand the majority's statement that the district court's findings were "erroneous as to the class of purchaser base price" (opinion at 805) to be a determination as to the proper class of purchaser.

APPENDIX F

CONSTITUTIONAL PROVISIONS

Article I, Section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 7, Clause 2:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; . . .

Article I, Section 7, Clause 3:

> Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

STATUTES

ECONOMIC STABILIZATION ACT OF 1970

12 U.S.C. § 1904 note (1976)

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render

judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d) (1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be

enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity

of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty-days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction

to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section shall apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

PUBLIC LAW 93-159; 87 STAT. 627

[S. 1570]

An Act to authorize and require the President of the United States to allocate crude oil, residual fuel oil, and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national

energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

DEFINITIONS

Sec. 3. For purposes of this Act:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than by

means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)), and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oil, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

MANDATORY ALLOCATION

Sec. 4(a). Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c) (1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to

each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2) (A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable

adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the manda-

tory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e) (1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b) (1) (E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2) (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f) (1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If—

(A) an order or regulation under section 203 (a) (3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a) (3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g) (1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House

was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a) (1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

EFFECT ON OTHER LAWS AND ACTIONS TAKEN THEREUNDER

Sec. 6. (a) All actions duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Eco-

nomic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act.

(b) The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

(c) (1) Except as specifically provided in this subsection, no provisions of this Act shall be deemed to convey to any person subject to this Act immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) As used in this subsection, the term "antitrust laws" includes—

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.);

(B) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.);

(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9); and

(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).

(3) The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its

promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternatives which would avoid or overcome such effects while achieving the purposes of this Act.

(4) Whenever it is necessary, in order to comply with the provisions of this Act or the regulation or any orders under section 4 thereof, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 5(b) of this Act); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication shall take place only in the presence of a representative of the Antitrust Division of the Department of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal Trade Commission, where it shall be made available for public inspection.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by

compliance with the provisions of this Act or with the regulation or any order under section 4 of this Act.

(6) There shall be available as a defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this Act or the regulation or any order under section 4 thereof, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection.

MONITORING BY FEDERAL TRADE COMMISSION

Sec. 7. (a) During the forty-five day period beginning on the effective date on which the regulation under section 4 first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness of this Act and actions taken pursuant thereto.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 6, 9, and 10 of the Federal Trade Commission Act to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 4 of the Federal Trade Commission Act).

Approved Nov. 27, 1973.

EMERGENCY PETROLEUM ALLOCATION ACT —EXTENSION

PUBLIC LAW 93-511; 88 STAT. 1608

[H.R. 16757]

An Act to extend the Emergency Petroleum Allocation Act of 1973 until August 31, 1975.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out "February 28, 1975" wherever it appears, and inserting in lieu thereof "August 31, 1975".

Approved Dec. 5, 1974.

PUBLIC LAW 94-99 [H.R. 9524]; SEPT. 29, 1975

EMERGENCY PETROLEUM ALLOCATION ACT OF 1975

An Act to extend the Emergency Petroleum Allocation Act of 1973.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Emergency Petroleum Allocation Act of 1975".

EXTENSION OF MANDATORY ALLOCATION PROGRAM

SEC. 2. Section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out "August 31, 1975," wherever it appears and inserting in lieu thereof "November 15, 1975,".

SEC. 3. It is the intent of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act.

SEC. 4. The purpose of this limited extension of the Emergency Petroleum Allocation Act is to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy. During the period of this extension it is the intent of the Congress that the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy under section 4(g)(2) of the Act prior to November 1, 1975. Any adjustment the President may make in price shall be in accord with his policy on inflation impact statements and economic

justification set forth in Executive Order Numbered 11821 and in Circular Numbered A-107, January 28, 1975, Office of Management and Budget.

SEC. 5. Any Senate resolution to disapprove a Presidential decontrol proposal submitted under section 4(g)(2) shall be immediately placed upon the Senate legislative calendar and any motion by the Majority Leader or his designee thereafter to proceed to the consideration of such disapproval resolution shall be decided without debate and by majority vote; and within forty-eight hours after the disapproval resolution is made the pending business or sooner if otherwise ordered by the Senate, the Chair shall direct the Clerk to call the roll on the final disposition of the disapproval resolution without any further debate or intervening motion, any other rule or provision of law notwithstanding.

Approved September 29, 1975.

PUBLIC LAW 94-133 [S. 2667]; Nov. 14, 1975

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

An Act to extend the Emergency Petroleum Allocation Act of 1973.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out each date specified therein and inserting in lieu thereof in each case "December 15, 1975".

SEC. 2. The amendments made in the first section of this Act to the Emergency Petroleum Allocation Act of 1973 shall take effect at midnight, November 15, 1975.

Approved November 14, 1975.

PUBLIC LAW 94-163 [S. 622]; DEC. 22, 1975

ENERGY POLICY AND CONSERVATION ACT

An Act to increase domestic energy supplies and availability; to restrain energy demand; to prepare for energy emergencies; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Energy Policy and Conservation Act".

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OIL PRICING POLICY

SEC. 401. (a) The Emergency Petroleum Allocation Act of 1973 is amended by adding at the end thereof the following new sections:

"OIL PRICING POLICY

"SEC. 8. (a) Not later than the first day of the second full calendar month following the date of enactment of this section, the President shall promulgate and make effective an amendment to the regulation under section 4(a) of this Act which regulation, as amended, shall establish ceiling prices (or the manner of determining ceiling prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 months thereafter shall not exceed a maximum of $7.66 per barrel (hereinafter in this section referred to as the "maximum weighted average first sale price"), except as may be adjusted pursuant to this section.

"(b) (1) The regulation under section 4(a), as amended pursuant to subsection (a) of this section or by any subsequent amendment thereto, may, subject to the limitations related to the maximum weighted average first sale price and other requirements of this section, provide for different ceiling prices (or manner of determining ceiling prices) for different classifications of crude oil produced in the United States. In providing for different ceiling prices (or the manner for determining such ceiling prices) and classifications for such crude oil, the

President shall determine that such ceiling prices (or the manner for determining such ceiling prices) and such classifications—

"(A) are administratively feasible; and

"(B) are justified on the basis that such prices and such classifications are consistent with obtaining optimum production of crude oil in the United States.

"(2) No amendment to the regulation under section 4(a) made after the date of enactment of this section may permit, in any month which begins after such date, an increase in the price for any volume of old crude oil production from any priorities, unless the President finds that such amendment—

"(A) will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development, from such properties; or

"(B) is necessary to take into account declining production from such properties; and

"(C) is likely to result in a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

"(3) As used in paragraph (2), the term 'old crude oil production' means that volume of crude oil produced and sold from a property in a month which is equal to or less than the volume of old crude oil, as defined in section 212.72 of title 10, Code of Federal Regulations (as in effect on November 1, 1975), produced and sold from such property in the months of September, October, and November of 1975, divided by 3.

"(c)(1) Not later than 6 months after the effective date of the amendment promulgated under subsection

(a), and not later than every 6 months thereafter, the President shall, on the basis of valid and reliable information (which may include information obtained by a valid and reliable sampling technique) of actual first sale prices of domestic crude oil, determine whether and the extent to which the actual weighted average first sale price for crude oil produced in the United States during any 6-month period or portion thereof for which data are available following the effective date of the amendment promulgated under subsection (a) of this section, exceeded or was less than the maximum weighted average first sale price of such crude oil specified in subsection (a) as may be adjusted pursuant to this section.

"(2) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a), as amended, resulted in an actual weighted average first sale price in excess of the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he shall amend the regulation to make such compensating adjustments as are necessary to result, in a corresponding period, in an actual weighted average first sale price for domestic crude oil sufficient to offset such excess.

"(3) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a), as amended, resulted in an actual weighted average first sale price less than the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he may, notwithstanding the requirements of this section pertaining to such maximum weighted average first sale price, amend the regulation to make such compensating adjustments in the regulation as are necessary to offset the deficiency in a corresponding period.

"(d)(1) The amendment promulgated pursuant to subsection (a) of this section (or any subsequent amendment to the regulation under section 4(a)) may provide

for an adjustment to the maximum weighted average first sale price specified in subsection (a), such adjustment to begin no earlier than in the calendar month following the first month the amendment is in effect—

"(A) to take into account the impact of inflation as measured by the adjusted GNP deflator; and

"(B) as a production incentive;

except that any adjustment as a production incentive shall not permit an increase in the maximum weighted average first sale price in excess of 3 per centum per annum (compounded annually), unless modified pursuant to this section, and the combined effect of any such adjustments referred to in subparagraphs (A) and (B) shall not result in an increase in the maximum weighted average first sale price in excess of 10 per centum per annum (compounded annually), unless modified pursuant to this section.

"(2) As used in this subsection, the term 'adjusted GNP deflator' means the first revision of the quarterly percent change, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modification as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after the date of enactment of this section in prices of imported crude oil, residual fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

"(3) The adjustment as a production incentive referred to in paragraph (1)(B) may be made only on a finding by the President that such an adjustment is likely to provide positive incentive for—

"(A) the discovery or development of high cost and high risk properties (including new wildcat

properties, and properties located on the Outer Continental Shelf, properties located north of the Arctic Circle, deep wells and deep horizons in onshore or offshore properties, and properties operated by independent producers);

"(B) the application of enhanced recovery techniques to producing properties to obtain a level of production higher than would otherwise occur from those properties but for such adjustment; or

"(C) sustaining production from marginal wells, including production from stripper wells.

"(e)(1) Not earlier than 90 days after the effective date of the amendment promulgated under subsection (a) and not earlier than 90 days after the date of any previous submission under this subsection, the President may submit to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to the regulation promulgated under section 4(a) which provides for (A) a production incentive adjustment to the maximum weighted average first sale price in excess of the 3 per centum limitation specified in subsection (d)(1), (B) a combined adjustment limitation in excess of the 10 per centum limitation specified in such subsection, or (C) both.

"(2) Any such amendment shall be accompanied by a finding that an additional adjustment as a production incentive, or a combined adjustment limitation greater than permitted by subsection (d)(1), or both, is necessary to provide a more adequate incentive with respect to the matters referred to in subparagraphs (A), (B), or (C) of subsection (d)(3).

"(3) Any such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(f) (1) On February 15, 1977, the President shall submit to the Congress a report containing an analysis of the impact of any amendment adopted pursuant to this section on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products.

"(2) The President may submit with such report to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to the regulation promulgated under section 4(a) which—

"(A) provides for the continuation or modification of the adjustment as a production incentive (referred to in subsection (d) as may have been amended pursuant to subsection (e));

"(B) provides for a modification of the combined adjustment limitation (referred to in subsection (d), as may have been amended pursuant to subsection (e)); or

"(C) provides for adjustments with respect to both subparagraphs (A) and (B).

"(3) Such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may, not later than 30 days after the date of such disapproval, submit one additional amendment in accordance with paragraph (2), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If no amendment to continue or modify the adjustment as a production incentive takes effect, no such

adjustment to the maximum weighted average first sale price thereafter may be taken into account in computing such price for any month which begins after (A) the date on which a submission could have been made under paragraph (2) but was not, or (B) the last date on which a submission was disapproved and no further submission pursuant to paragraph (4) could be made, except that the President may, pursuant to the procedures under subsection (e), submit an amendment to the regulation to provide for a prospective reinstatement of such adjustment or of a modification of such adjustment.

"(g)(1) On April 15, 1977, the President shall submit to the Congress a report as to whether the regulation promulgated under section 4(a) and in effect on such date will provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States.

"(2) If the President determines that a price required to provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) would, because of the maximum weighted average first sale price specified in subsection (a) of this section, as adjusted, have the effect of reducing or limiting ceiling prices permitted for crude oil produced in the remainder of the United States to levels which would result in less production of such crude oil than would otherwise occur, the President may, together with such report, or at any time thereafter not earlier than 90 days after any previous submission under this subsection, except as provided in paragraph (4), submit to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act an amendment to the regulation promulgated under section 4(a) which—

"(A) excludes up to 2 million barrels a day of crude oil production transported through the trans-Alaska pipeline from the computation of the maximum weighted average first sale price specified in subsection (a); and

"(B) establishes ceiling prices (or a manner of determining prices) for the first sale of crude oil production referred to in subparagraph (A) such that the actual weighted average first sale price for such production will not exceed the highest actual weighted average first sale price permitted under the regulation for significant volumes of any other classification of domestic crude oil.

"(3) Any such amendment shall be accompanied by such findings and supporting rationale as the President determines justify such ceiling prices (or manner for determining such prices). Any amendment submitted to the Congress pursuant to this subsection shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval submit one additional amendment in accordance with paragraphs (2) and (3), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If any amendment submitted by the President to the Congress pursuant to this subsection becomes effective, such amendment may thereafter be further amended by the President, subject to the procedures and requirements of paragraphs (2) and (3) of this subsection, except that no such further amendment shall be submitted

earlier than January 1, 1978, and thereafter no earlier than 90 days after the date of any previous submission made under this paragraph.

"(h) In any judicial review of an amendment required by this section to be submitted to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of this section or of subparagraph (A), (E), or (F) of section 706(2) of title 5, United States Code.

"PASSTHROUGHS OF PRICE DECREASES

"SEC. 9. Not later than the first day of the second full calendar month following the date of enactment of this section, the regulation under section 4(a) shall provide for a dollar-for-dollar passthrough in prices at all levels of distribution from the producer through the retail level of decreases in the costs of crude oil, residual fuel oil, and refined petroleum products (including decreases in costs which result from a reduction in the price of crude oil produced in the United States because of the amendment to such regulation required under section 8(a)).".

(b)(1) Subsections (d), (e) and (g) of section 4 of the Emergency Petroleum Allocation Act of 1973 are repealed, and subsection (f) of such section 4 is redesignated as subsection "(d)" of such section 4.

(2) Section 4(a) of such Act is amended by (A) striking out "Subject to subsection (f)" and inserting in lieu thereof "Subject to subsection (d)"; and (B) striking out "Except as provided in subsection (e) such" and inserting in lieu thereof "Such".

(3) Section 4(c) of such Act is amended in paragraphs (1), (4), and (5) thereof by striking out "sub-

sections (b) and (d)" wherever it appears and by inserting in lieu thereof in each case "subsection (b)".

(4) Section 406 of Public Law 93-153 is repealed.

(5) The amendments made by paragraphs (1), (2), (3), and (4) of this subsection, to the Emergency Petroleum Allocation Act of 1973, shall take effect on the effective date of the amendment to the regulation under section 4(a), required by section 8(a) of such Act.

LIMITATIONS ON PRICING POLICY

SEC. 402. (a) Paragraph (2) of section 4(b) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

"(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a)—

"(A) shall provide for a dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level:

"(B) (i) shall not permit any net crude oil cost increases—

"(I) which are incurred by a refiner during the calendar month immediately preceding the effective date of this paragraph, or in any month thereafter, and

"(II) which are not passed through in prices charged pursuant to such regulation in the 2 calendar months following the calendar month in which such crude oil cost increases were incurred.

to be passed through by such refiner in any month subsequent to the 2 calendar months following the

calendar month in which such crude oil cost increases were incurred, unless the President makes the findings specified in clause (ii) (II) (aa), and such passthrough is consistent with the requirements specified in clause (ii) (II) (bb).

"(ii) shall not permit the passthrough in any month of—

"(I) any net crude oil cost increases incurred by a refiner not later than the last day of the calendar month which begins two months prior to the effective date of this paragraph and not passed through by the end of the last calendar month prior to the effective date of this paragraph unless such passthrough is not in excess of 10 percent of the total amount of such increased crude oil costs not passed through as of the last day of the last calendar month prior to the effective date of the amendment promulgated under section 8(a); and

"(II) any net crude oil cost increases incurred by a refiner after the effective date of this paragraph, which net crude oil cost increases were not passed through within the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless—

"(aa) the President finds, and reports to the Congress with respect to such finding, that a passthrough of such crude oil cost increases is necessary to alleviate the impact on refiners, marketers, or consumers of significant increases in costs, to provide for equitable cost recovery consistent with the attainment, to the maximum extent practicable, of the objectives specified in paragraph (1), or to avoid competitive disadvantage; and

"(bb) such passthrough in any month of such crude oil cost increases is not in excess of 10 percent of the total amount of such crude oil cost increases as of the end of the calendar month in which the effective date of this paragraph occurs or any month thereafter;

"(C) shall provide for the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel, and refined petroleum products at all levels of marketing and distribution; and

"(D) shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner; except that the President may, by amendment to the regulation under subsection (a) or by order, permit deviation from such proportionate distribution of costs, if the President finds that refinery operations justify such deviation and further finds that to permit such deviation is consistent with the attainment of the objectives in paragraph (1) and would not result in inequitable prices for any class of users of such product.

As used in this paragraph, the term 'effective date of this paragraph' means the effective date specified in section 402(b) of the Energy Policy and Conservation Act.".

(b) The amendment made by this section, to the Emergency Petroleum Allocation Act of 1973, shall take effect on the effective date of the amendment to the regulation under section 4(a), required by section 8(a) of such Act.

(c) The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"LIMITATIONS ON PRICING AUTHORITY

"SEC. 10. The President shall have no authority, under this Act, or under the Energy Policy and Conservation Act, to prescribe minimum prices of crude oil (or any classification thereof), residual fuel oil, or any refined petroleum product.".

ENTITLEMENTS

SEC. 403. (a) Section 4 of the Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following:

"(e) Any provision of the regulation under subsection (a) of this section—

"(1) which requires the purchase of entitlements, or the payment of money through any other similar cash transfer arrangement, the purpose of which is to reduce disparities in the crude oil acquisition costs of domestic refiners, and

"(2) which is based upon the number of barrels of crude oil input, or receipts, or both, of any refiner,

shall not apply to the first 50,000 barrels per day of input, or receipts, or both, of any refiner whose total refining capacity (including the refining capacity of any person who controls, is controlled by, or is under common control with such refiner) did not exceed on January 1, 1975, and does not thereafter exceed 100,000 barrels per day. The preceding sentence shall not affect any provisions of the regulation under subsection (a) of this section with respect to the receipt by any small refiner as defined in section 3(4) of payments for entitlements or any other similar cash transfer arrangement.".

(b) Subsection (a) of this section shall apply with respect to payments due on or after the last day of the month during which the date of enactment of this Act occurs.

PART B—OTHER AMENDMENTS TO THE ALLOCATION ACT

AMENDMENTS TO THE OBJECTIVES OF THE ALLOCATION ACT

SEC. 451. (a) Section 4(b)(1)(A) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

> "(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense:".

(b) Section 4(b)(1)(G) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

> "(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—
>
> "(i) fuels, and
>
> "(ii) minerals essential to the requirements of the United States,
>
> and for required transportation related thereto:".

PENALTIES UNDER THE ALLOCATION ACT

SEC. 452. Section 5 of the Emergency Petroleum Allocation Act of 1973 is amended:

> (1) by striking out "sections 205 through 211" in subsection (a)(1) of such section and inserting in lieu thereof "sections 205 through 207 and sections 209 through 211"; and

(2) by adding at the end of subsection (a) of such section the following:

"(3) (A) Whoever violates any provision of the regulation under section 4(a) of this Act, or any order under this Act shall be subject to a civil penalty—

"(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and

"(iii) with respect to activities—

(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

(II) activities not referred to in clause (i) or (ii) of subclause (I) of this clause, of not more than $2,500 for each violation.

"(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or—

"(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

"(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petro-

leum product at the retail level or any other person shall be fined not more than $10,000 for each violation;

or both.

"(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.".

ANTITRUST PROVISION IN ALLOCATION ACT

SEC. 453. Section 6(c) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

"(c) There shall be available as a defense to any action brought for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under this Act.".

EVALUATION OF REGULATION UNDER THE ALLOCATION ACT

SEC. 454. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"REEVALUATION OF SECTION 4(A) REGULATION

"SEC. 11. (a) Not later than 60 days after the date of enactment of this section, the President shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views, and arguments respecting the appropriateness of, or the continuing need for, the application of any provision of the regulation promulgated under section 4(a) as such provision relates to the attainment of the objectives specified in section 4(b)(1) of section 4. A transcript shall be kept of any such oral presentations of data, views, and argument.

"(b) The President shall, after consideration of such written and oral presentations and such other information as may be available to him—

"(1) analyze such presentations and report thereon to the Congress within 120 days after the date of enactment of this section; and

"(2) shall promulgate, pursuant to the limitations and authority under section 12, such amendment, or amendments, to the regulation promulgated under section 4(a) as he determines are necessary or appropriate—

"(A) to modify any provisions of such regulation in a manner which is consistent with the attainment, to the maximum extent practicable, of objectives specified in section 4(b)(1); or

"(B) to eliminate any provisions of such regulation no longer necessary to provide for the attainment of such objectives.".

CONVERSION TO STANDBY AUTHORITIES

SEC. 455. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"CONVERSION MECHANISMS TO STANDBY AUTHORITIES

"SEC. 12. (a) The President may not amend the regulation under section 4(a) in any manner which—

"(1) exempts crude oil produced in the United States from any provision of such regulation required to be made a part of such regulation by section 8; or

"(2) results in making such regulation, as so amended, inconsistent with any limitation or other requirement specified in section 8.

"(b) Except as provided in subsection (a), the President may amend the regulation under section 4(a) if he determines that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

"(c)(1) Any such amendment which, with respect to a class of persons or class of transactions (including transactions with respect to any market level), exempts crude oil, residual fuel oil, or any refined petroleum product or refined product category from the provisions of the regulation under section 4(a) as such provisions pertain to either (A) the allocation of amounts of any such oil or product, or (B) the specification of price or the manner for determining the price of any such oil or product, or both of the matters described in subparagraphs (A) and (B), may take effect only pursuant to the provisions of this subsection.

"(2) The President shall submit any amendment referred to in paragraph (1) to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act. Any such amendment shall be accompanied by a specific statement of the

President's rationale for such amendment and the matter described in subsection (d) of this section. Such an amendment—

"(A) may apply only to one oil or one refined product category;

"(B) may apply to the matters specified in either subparagraph (A) or (B) of paragraph (1) of this subsection, or both; and

"(C) may provide for scheduled or phased implementation.

"(3) As used in this section the term 'refined product category' means—

"(A) motor gasoline;

"(B) Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel);

"(C) propane; or

"(D) all or any portion of other refined petroleum products as a class (including natural gas liquids and natural gas liquid products, other than propane).

"(4) Such an amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(d)(1) The President shall support any amendment described in subsection (b) which is transmitted to the Congress under subsection (c) of this section with a finding that such amendment is consistent with the attainment of the objectives specified in subsection 4(b)(1) and in the case of—

"(A) any exemption described in subsection (c)(1)(A), with a finding that such oil or refined product category is no longer in short supply and that

exempting such oil or refined product category will not have an adverse impact on the supply of any other oil or refined petroleum product subject to this Act; and

"(B) any exemption described in subsection (c) (1) (B), with a finding that competition and market forces are adequate to protect consumers and that exempting such oil or refined product category will not result in inequitable prices for any class of users of such oil or product.

"(2) Any amendment which the President submits to the Congress under subsection (c) of this section shall be accompanied—

"(A) by a statement of the President's views as to the potential economic impacts (if any) of such amendment which, where practicable, shall include his views as to—

"(i) the State and regional impacts of such amendment (including effects on governmental units);

"(ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as fuel or as feedstock for industry; and

"(iii) the effects on employment and consumer prices; and

"(B) in the case of an exemption described in subsection (c) (1) (B) of this section, by an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

"(e) In any judicial review of an amendment required by this section to be submitted to Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of subsection (c), (d), or (g) of this section or subparagraph (A), (E), or (F), of section 706(2) of title 5, United States Code.

"(f) With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specication of price or the manner for determining the price, of any such oil or refined product category upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 4(b)(1). Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section.

"(g) Notwithstanding the provisions of subsection (e) of section 4, the President may, if he determines that the exemption from payments for certain small refiners required by such subsection—

"(1) results in unfair economic or competitive advantage with respect to other small refiners; or

"(2) otherwise has the effect of seriously impairing the President's ability to provide in the regulation under section 4(a) for the attainment of the objective specified in section 4(b)(1)(D) and for the attainment of those other objectives specified in section 4(b)(1);

submit, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to modify the regulation under section 4(a) with respect to the provisions of such regulation as they relate to such exemption. Such amendment shall not take effect if disapproved by either House of Congress under the procedures specified in such section 551.".

TECHNICAL PURCHASE AUTHORITY

SEC. 456. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"TECHNICAL PURCHASE AUTHORITY

"SEC. 13. (a) The President may, by amendment to the regulation under section 4(a) of this Act, provide for and implement a procedure pursuant to which the United States may exercise the exclusive right to import and purchase all or any part of the crude oil, residual fuel oil, and refined petroleum products of foreign origin for resale in the United States.

"(b) The authorities granted under this section shall not be used for the purpose, or with the effect, of providing a subsidy or preference to any importer, purchaser, or user.

"(c) In exercising any authorities granted under this section, the President shall endeavor to buy and sell without profit or loss, except that the President may, in individual cases, sell, on a competitive bid basis, crude oil, residual fuel oil, or any refined petroleum product at a price above or below the cost of such oil or product if, in the judgment of the President, such sales may result in progress toward a lower price for oil sold in international commerce.

"(d) Any amendment to the regulation proposed to be implemented under this section shall be submitted to

Congress for review under section 551 of the Energy Policy and Conservation Act, together with a detailed explanation of the procedure to be employed and the need therefor and shall be supported by findings by the President that the exercise of such authority is likely to reduce prices for imported oils and products. Such amendment shall not take effect if disapproved by either House of the Congress in accordance with the procedures specified in section 551 of such Act and any authority to purchase shall be subject to appropriations Acts.

"(e) The President shall submit, within 90 days after the date of enactment of this section, a report which evaluates the feasibility of reducing the price of crude oil, residual fuel oil, or refined petroleum products of foreign origin for resale in the United States by providing incentives for domestic producers who also import such oils or products into the United States, to work for the reduction of the price of such oils or products. The report shall specifically discuss whether increasing aggregate old crude oil prices by an amount related to any decrease in aggregate prices for such imported oils and products would serve as an incentive for domestic producers to reduce the price of such imported oils and products.".

DIRECT CONTROLS ON REFINERY OPERATIONS

SEC. 457. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"DIRECT CONTROLS ON REFINERY OPERATIONS

"SEC. 14. The President may, by amendment to the regulation under section 4(a) of this Act or by order, as may be consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) of this Act, require adjustments in the operations of any refinery in the United States with re-

spect to the proportions of residual fuel oil or any refined petroleum product produced through such operations if he determines such adjustments are necessary to assure the production of residual fuel oil or any refined petroleum product in such proportions as are necessary or appropriate to provide for the attainment, to the maximum extent practicable, the objectives specified in section 4(b)(1).".

INVENTORY CONTROLS

SEC. 458. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"INVENTORY CONTROLS

"SEC. 15. (a) In addition to other authority provided for in this Act to alleviate shortages of crude oil, residual fuel oil, and refined petroleum products, the President may, if he finds an existing or impending regional or national supply shortage of any fuel, by amendment to the regulation under section 4(a) of this Act or by order, consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1), require adjustments in the amounts of crude oil, residual fuel oil or any refined petroleum product which are held in inventory by persons who are engaged in the business of importing, producing, refining, marketing, or distributing such oils or products.

"(b) The authority specified in subsection (a) may be exercised to require either—

"(1) a distribution from such inventories to specified persons or classes of persons at specified rates of distribution or to specified levels of inventory accumulation; or

"(2) the accumulation of inventories at specified rates of accumulation or to specified levels.

as the President determines may be necessary or appropriate to provide for the attainment, to the maximum extent practicable, of the objectives of section 4(b)(1) or as the President determines may be necessary or appropriate to carry out the obligations of the United States under the international energy program, as defined in section 3 of the Energy Policy and Conservation Act.

"(c) The authority specified in subsection (a) may require the maintenance of inventories at levels greater or lesser than such person's normal business or operating requirements; except that such amounts shall not exceed the amount of oil or product, as the case may be, such person would use or distribute during any 90-day period of peak usage and in no case may the requirement to accumulate inventories be applied to any person in a manner which would necessitate such person making physical additions to storage facilities in order to comply with any such rule or order.".

HOARDING PROHIBITIONS

SEC. 459. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"HOARDING PROHIBITIONS

"SEC. 16. Except as may be otherwise provided with respect to persons engaged in the business of producing, refining, distributing, or marketing crude oil, residual fuel oil, or any refined petroleum product pursuant to section 15 or pursuant to requirements under section 156 of the Energy Policy and Conservation Act (relating to the Industrial Strategic Petroleum Reserve), the regulation under section 4(a) shall prohibit any person, during a severe energy supply interruption (as defined in section 3 of the Energy Policy and Conservation Act) from willfully accumulating crude oil, residual fuel oil, or any refined petroleum product in inventories, or otherwise,

in amounts which are in excess of such person's reasonable needs (as such term shall be defined in such regulation).".

ASPHALT ALLOCATION AUTHORITY

SEC. 460. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"ASPHALT ALLOCATION AUTHORITY

"SEC. 17. (a) The President may amend the regulation under section 4(a) of this Act to require, in a manner which he finds is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) of this Act, the allocation of asphalt in amounts specified in (or determined in the manner prescribed by), or at prices specified in (or determined in a manner prescribed by) such amendment to the regulation, or both.

"(b) If the President exercises the authority under this section, he may thereafter amend the regulation under section 4(a) to exempt asphalt from such regulation without regard to the provisions of section 12 of this Act.".

EXPIRATION OF AUTHORITIES

SEC. 461. The Emergency Petroleum Allocation Act of 1973 is amended by adding to the end of such Act, as amended by this Act, the following new section:

"EXPIRATION OF AUTHORITIES

"SEC. 18. Notwithstanding any other provision of this Act, at midnight on the conclusion of the 40th month in which the amendment under section 8(a) is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 4(a) of this Act shall become discretionary rather than mandatory, and

the limitations on the President's authority contained in sections 4(b)(2), 8, and 9 of this Act shall terminate. The authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.".

REIMBURSEMENT TO STATES

SEC. 462. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"REIMBURSEMENT TO STATES

"SEC. 19. (a) The President is authorized to reimburse any State for expenses incurred by such State in carrying out any responsibilities delegated to such State by the President under the provisions of this Act.

"(b) Such reimbursements may be paid from any funds appropriated for the purpose of carrying out responsibilities under this Act, unless any appropriation Act specifically provides to the contrary.

"(c) No later than June 1, 1976, the President shall submit a report to the Congress analyzing and detailing the amount and nature of any reimbursements made to any State for expenses described in subsection (a) incurred prior to such date and specifically recommending whether authorizations of additional funds for direct grants to States are necessary or appropriate for the continued operation of the reimbursement provisions authorized by this section.".

EFFECTIVE DATE OF ALLOCATION ACT AMENDMENTS

SEC. 463. Except as otherwise provided, the amendments made by this Act to the Emergency Petroleum Allocation Act of 1973 shall take effect as of midnight, December 15, 1975.

PART C—CONGRESSIONAL REVIEW

PROCEDURE FOR CONGRESSIONAL REVIEW OF PRESIDENTIAL REQUESTS TO IMPLEMENT CERTAIN AUTHORITIES

SEC. 551. (a) For purposes of this section, the term "energy action" means any matter required to be transmitted, or submitted to the Congress in accordance with the procedures of this section.

(b) The President shall transmit any energy action (bearing an identification number) to both Houses of Congress on the same day. If both Houses are not in session on the day any energy action is received by the appropriate officers of each House, for purposes of this section such energy action shall be deemed to have been transmitted on the first succeeding day on which both Houses are in session.

(c) (1) Except as provided in paragraph (2) of this subsection, if energy action is transmitted to the Houses of Congress, such action shall take effect at the end of the first period of 15 calendar days of continuous session of Congress after the date on which such action is transmitted to such Houses, unless between the date of transmittal and the end of such 15-day period, either House passes a resolution stating in substance that such House does not favor such action.

(2) An energy action described in paragraph (1) may take effect prior to the expiration of the 15-calendar-day period after the date on which such action is transmitted, if each House of Congress approves a resolution affirma-

tively stating in substance that such House does not object to such action.

(d) For the purpose of subsection (c) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 15-calendar-day period.

(e) Under provisions contained in an energy action, a provision of such an action may take effect on a date later than the date on which such action otherwise takes effect pursuant to the provisions of this section.

(f) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress described in subparagraph (A) or (B) of this paragraph.

(A) A resolution the matter after the resolving clause of which is as follows: "That the ———— does not object to the energy action numbered ———— submitted to the Congress on ————,

19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one energy action.

(B) A resolution the matter after resolving clause of which is as follows: "That the ———— does not favor the energy action numbered ———— transmitted to Congress on ———, 19—", the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one energy action.

(3) A resolution once introduced with respect to an energy action shall immediately be referred to a committee (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to an energy action has been referred has not reported it at the end of 5 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration of any other resolution with respect to such energy action which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same energy action), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not

be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same energy action.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to; except that it shall be in order—

(i) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2) (A) of this subsection with respect to an energy action, for a resolution described in paragraph (2) (B) of this subsection with respect to the same such action, or

(ii) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2) (B) of this subsection with respect to an energy action, for a resolution de-

scribed in paragraph (2)(A) of this subsection with respect to the same such action.

The amendments described in clauses (i) and (ii) of this subparagraph shall not be amendable.

(6)(A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate.

(7) Notwithstanding any of the provisions of this subsection, if a House has approved a resolution with respect to an energy action, then it shall not be in order to consider in that House any other resolution with respect to the same such action.

EXPEDITED PROCEDURE FOR CONGRESSIONAL CONSIDERATION OF CERTAIN AUTHORITIES

SEC. 552. (a) Any contingency plan transmitted to the Congress pursuant to section 201(a)(1) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(b) No such contingency plan may be considered approved for purposes of section 201(a)(2) of this Act unless between the date of transmittal and the end of the first period of 60 calendar days of continuous session of Congress after the date on which such action is transmitted to such House, each House of Congress passes a resolution described in subsection (d)(2).

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-calendar-day period.

(d) (1) This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress the matter after the resolving clauses of which is as follows: "That the ———— approves the contingency plan numbered ———— submitted to the Congress on ————, 19—.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one contingency plan.

(3) A resolution once introduced with respect to a contingency plan shall immediately be referred to a committee (and all resolutions with respect to the same contingency plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4) (A) If the committee to which a resolution with respect to a contingency plan has been referred has not

reported it at the end of 20 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration of any other resolution with respect to such contingency plan which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same contingency plan), and debate thereon shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same contingency plan.

(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the notion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An

amendment to, or motion to recommit the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(6) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedures relating to a resolution shall be decided without debate.

Approved December 22, 1975.

APPENDIX H

REGULATIONS

FEDERAL ENERGY ADMINISTRATION

[10 CFR Part 211]

EXEMPTION OF RESIDUAL FUEL OIL FROM THE MANDATORY PETROLEUM ALLOCATION REGULATIONS

Proposed Rulemaking and Public Hearing

The Federal Energy Administration hereby gives notice of a proposal to amend 10 CFR Part 211 to exempt residual fuel oil from allocation under the Mandatory Petroleum Allocation Regulations. The FEA also gives notice that it will receive written comments and hold a public hearing with respect to the proposal to exempt residual fuel oil from allocation.

The Emergency Petroleum Allocation Act of 1973 provides for the mandatory allocation of crude oil, residual fuel oil and most refined petroleum products manufactured in or imported into the United States. The Act specifies that the regulations promulgated thereunder are to remain in effect until February 28, 1975. Under section 4(g)(2) of the Act, however, if the President or his delegate finds that (1) application of the regulations to crude oil, residual fuel oil or a particular petroleum product is not necessary to carry out the purposes of the Act, (2) there is no domestic shortage of the particular oil or product; and (3) exempting such oil or product would not have an adverse impact on the domestic supply of any other oil or refined petroleum product subject to the Act, he may prescribe an amendment to the regulations exempting the oil or product from the regulations for a period of not more than ninety days. Such an amend-

ment must be submitted to the Congress along with findings in support thereof at least five days during which each house is in session prior to the effective date. If either house disapproves the amendment, it shall not become effective, and the oil or product will continue under the allocation program.

The FEA has concluded that current and projected supplies of residual fuel oil from both domestic and foreign sources are adequate to meet demand through the end of this year. The FEA also believes that residual fuel oil may be exempted from mandatory allocation at this time consistent with the objectives of the Act and without creating shortages of crude oil or other refined petroleum products subject to the Act. The data which support these conclusions, and an explanation of the data, are contained in Appendix A to this notice. A more detailed explanation of the FEA's method of estimating supply and forecasting demand and of FEA data analysis is contained in FEO Technical Report 74-3. Residual Fuel Oil Supply and Demand Forecasts. July 1974—December 1974, copies of which may be obtained from the Office of Public Affairs. FEA, Washington, D.C. 20461.

The FEA therefore proposes to revoke Subpart I of Part 211, ending the mandatory allocation of residual fuel oil for a period of ninety days, beginning August 1, 1974. The FEA, however, proposes to retain certain recordkeeping and reporting requirements relating to production, imports, inventories, and consumption of residual fuel oil, so that it may monitor the supply and demand situation closely, and to maintain a standby management capability so that the allocation of residual fuel oil could be quickly reinstituted should such a step by required by altered circumstances.

As required by section 7(c)(2) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, a copy of this notice has been submitted to the Administrator of

the Environmental Protection Agency for his comments concerning the impact of this proposal on the quality of the environment. The Administrator's comments are contained in Appendix B to this notice.

The purpose of this rulemaking proceeding and public hearing is to elicit information and views of interested persons regarding the proposed exemption of residual fuel oil from mandatory allocation. The FEA invites the submission of data, arguments, and information with respect to this proposal and with respect to the findings required to be made under the Emergency Petroleum Allocation Act of 1973. Specifically, the FEA invites the submission of information or comments with respect to:

(a) Whether there is or is not a shortage of residual fuel oil;

(b) Whether the mandatory allocation of residual fuel oil is or is not necessary to carry out the Mandatory Petroleum Allocation Act of 1973, to provide for:

(1) Protection of public health, safety, and welfare, (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units) and the national defense;

(2) Maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(3) Maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(4) Preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of

independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(5) The allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(6) Equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(7) Allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction, of, fuels, and for required transportation related thereto;

(8) Economic efficiency; and

(9) Minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms;

(c) Whether exempting residual fuel oil will or will not have an adverse impact on the supply of crude oil or refined petroleum products subject to the Mandatory Petroleum Allocation Act of 1973.

While the FEA does not at the present time propose to exempt residual fuel oil from the mandatory price regulations, comments from interested persons are invited on the effect of such an exemption and arguments for or against such an exemption. In addition, the FEA invites comments on the following issues:

(a) The effect of ending the mandatory allocation of residual fuel oil, without exempting it from the price regulations, on the price of residual fuel oil, and the resulting effect of any changes in price on demand for residual fuel oil;

(b) The effect of ending the mandatory allocation of residual fuel oil on the availability of low sulfur residual fuel oil;

(c) The effect of availability of fuels not subject to the Mandatory Petroleum Allocation Act of 1973, such as coal and natural gas, on the demand for residual fuel oil; and

(d) The effect of planned conversion of electric utilities from residual fuel oil to coal.

Interested persons may participate in this rulemaking by submitting written data, views, or arguments with respect to the proposal, and any information that is relevant to a decision in this matter, to the Executive Secretariat, FEA. Box AN, Washington, D.C. 20461.

Comments should be identified on the outside envelope and on the documents submitted to the Executive Secretariat, FEA, with the designation "Residual Fuel Oil." Fifteen copies should be submitted. All comments received by July 22, 1974, and all other relevant information will be considered by the FEA before final action is taken on the proposed regulations.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. The FEA reserves the right to determine the confidential status of the information or data and to treat it according to its determination.

The public hearing in the proceeding will be held beginning at 9:30 a.m., on Monday, July 22, and will be continued on Tuesday, July 23, 1974, if necessary, at the New Post Office Building, 12th & Pennsylvania Avenue, NW., Washington, D.C., to receive comments from interested persons on the matters set forth herein. Any person who has an interest in the subject of the hearing, or who is a representative of a group or class of persons

which has an interest in the subject of the hearing, may make a written request for an opportunity to make oral presentation. Such a request should be directed to the Executive Secretariat FEA, and must be received before 4:30 p.m., e.d.t., July 15, 1974. Such a request may be hand delivered to Room 3309 New Post Office Building, 12th and Pennsylvania Avenue, NW., Washington, D.C., between the hours of 8 a.m., and 4:30 p.m., Monday through Friday, or may be submitted by Telex (710-822-0155). The person making the request should be prepared to describe the interest concerned if appropriate, to state why he is a proper representative of a group or class of persons which has such an interest; and to give a concise summary of the proposed oral presentation and a phone number where he may be contacted through July 18, 1974. Each person selected to be heard will be so notified by the FEA before 5:30 p.m., e.d.t., July 18, 1974 and must submit 100 copies of his statement to the Executive Secretariat, FEA, Room 3315, New Post Office Building, Washington, D.C. 20461, before 9 a.m., e.d.t., July 22, 1974.

The FEA reserves the right to select the persons to be heard at the hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. Each presentation may be limited, based on the number of persons requesting to be heard.

An FEA official will be designated to preside at the hearing. It will not be a judicial or evidentiary-type hearing. Questions may be asked only by those conducting the hearing, and there will be no cross-examination of persons presenting statements. Any decision made by the FEA with respect to the subject matter of the hearing will be based on all information available to the FEA. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity if he so desires, to make a rebuttal state-

ment. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any interested person may submit questions, to be asked of any person making a statement at the hearing, to the Executive Secretariat, FEA, before 4:30 p.m., e.d.t., July, 19, 1974. Any person who makes an oral statement and who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer. The FEA or the presiding officer, if the question is submitted at the hearing, will determine whether the question is relevant, and whether time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by the FEA and made available for inspection at the Public Reference Facility of the FEA, Room 3130, New Post Office Building, 12th and Pennsylvania Avenue, NW., Washington, D.C., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Anyone may buy a copy of the transcript from the reporter.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159; Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185)

In consideration of the foregoing, it is proposed to amend 10 CFR Part 211 as set forth herein.

Issued in Washington, D.C., July 3, 1974.

ROBERT E. MONTGOMERY, Jr.,
Acting General Counsel,
Federal Energy Administration.

[Appendices Omitted]

FEDERAL ENERGY ADMINISTRATION

[10 CFR Part 212]

PHASE-OUT OF OLD OIL PRICE CEILINGS

Notice of Proposed Rulemaking and Public Hearing

The Federal Energy Administration (FEA) hereby gives notice of a proposal to amend Part 212 of Title 10 of the Code of Federal Regulations to phase out over a two-year period all price controls on crude oil at the producer level. The FEA will receive written comments and hold a public hearing with respect to this proposal.

In his State of the Union Message on January 15, 1975, President Ford called for a massive energy conservation program in which consumption of energy resources would be reduced and domestic production of fuels would be increased, in order to reduce this country's dependence on imported crude oil. Among specific complementary measures proposed to curtail domestic energy consumption, the President listed decontrol of the price of domestic crude oil. This notice implements the President's stated intention to take steps leading to decontrol of domestic crude oil.

Decontrol would permit domestic crude oil prices to rise to the prevailing world price levels so that the demand-dampening effects which have been felt world-wide would be felt to the full extent in the United States. Under the two-tiered price system now in effect, the price of most domestic oil is held at a level approximately half that of world price levels, so that the impact which the escalation of free market prices has had on demand overseas has been considerably cushioned in the United States. The removal of price controls on domestic crude oil is a

necessary and integral part of the program to reduce energy consumption and curtail dependence on imported crude oil.

Other parts of the President's program call for legislative action. In particular, the enactment of a windfall profits tax and of legislation to alleviate the impact of higher energy costs on consumers have been proposed. In light of the fact that action on these proposals has not yet been taken, and in order to alleviate the impact of price decontrol of domestic crude oil, this proposal is for gradual rather than total decontrol. The Congress will therefore be afforded further time in which to enact the essential measures needed for a comprehensive energy program, but at the same time, the economic disincentives and distortions resulting from current price controls will be gradually eliminated.

In addition to conserving domestic supplies by reducing demand, decontrol of domestic crude oil prices would stimulate domestic production, or at least slow the rate of decline in domestic production, displacing some supplies of crude oil that would otherwise have to be imported. It is now generally agreed that measures to insure maximum domestic production of crude oil are essential in order to assure adequate and dependable energy resources for the United States, until alternative domestic energy resources can be developed over the long term. Furthermore, the reasons noted below, the FEA has found that the production incentives afforded since the fall of 1973 by the rules permitting "new" and "released" domestic crude oil to be sold at free market prices are of decreasing impact or effectiveness.

The prices for domestic crude oil (other than crude oil produced from a stripper well lease) are determined under FEA regulations according to the number of barrels produced and sold each month from each property. If the current month's production from the property con-

cerned is less than that in the corresponding month of 1972, all of the production must be sold at or below the ceiling price established for "old crude petroleum." The ceiling price now is the May 15, 1973 posted price for the particular crude oil concerned plus $1.35 per barrel. The national average of such ceiling prices is currently approximately $5.25 per barrel. However, in order to encourage increased production of domestic crude oil, the FEA regulations permit all production in excess of the 1972 base level (less adjustments for production at less than the 1972 base level in prior months) to be sold as "new crude petroleum" at the higher market level prices (currently $11.50 per barrel and higher). As a further incentive to increased production, an amount of the month's production which equals the amount of "new oil" produced may also be sold at the higher market level prices, provided that such amounts of crude oil, called "released crude petroleum," do not exceed the production level of the 1972 base month. Thus, if the production from a property in the 1972 base month was 10,000 barrels and was 13,000 barrels in the current month, 7,000 barrels of the current month's production would be subject to the "old oil" price ceiling while 3,000 barrels could be sold at market level prices as "new" and an additional 3,000 barrels could be sold at market level prices as "released" crude oil (assuming no adjustments were needed for past production deficiencies).

At present, nearly two-thirds of total domestic crude oil production qualifies as old oil and is therefore subject to the price ceiling. The remaining one-third of total domestic production is either specifically exempt from price controls under the stripper well lease exemption or is permitted to be sold at free market levels under the production-incentive rules governing the sale of "new" and "released" crude oil.

Many producers, especially those whose current production levels are substantially below the 1972 base levels

and are further declining under primary recovery techniques, remain unaffected by the incentives presently afforded because those incentives are too remote to outweigh the cost of implementing the substantial secondary or tertiary recovery programs which would be necessary to bring production up to and above the 1972 base levels. Under the proposed amendments when fully implemented, any and all additional recoveries would bring the higher price available to uncontrolled oil.

The existing incentives are only effective for limited periods of time in any event, since the inevitable slackening of output will eventually bring production below base levels to the point where existing incentives are no longer adequate to encourage investment in secondary/tertiary recovery and other costly programs designed to increase total output of crude oil. While it is true that the additional incentive afforded by the proposed gradual decontrol of old oil would also eventually diminsh in effect due to the inevitable decline or exhaustion of worked-over reservoirs, the purpose of FEA is not to devise a permanent solution to limited domestic production capabilities but to propose incentives of sufficient effectiveness and duration as will yield maximum levels of domestic production until such time as supplementary energy resources can be developed and exploited. Although existing incentives are believed to have contributed substantially to the current improvement in the rate of decline in domestic production, the FEA believes that existing incentives clearly cannot work to maintain domestic production at levels now thought necessary to avoid an unacceptable degree of reliance on imported fuels over the next few years.

An additional benefit of decontrol of domestic crude oil will be the elimination of economic distortions caused by the present two-tiered pricing system. The two-tiered pricing system inevitably causes cost disparities among refiners and marketers of petroleum products. Although

these cost disparities have been substantially reduced by the crude oil entitlements program, they can never be entirely eliminated while the two-tiered pricing system exists. Such cost disparities significantly hinder FEA's ability to assure that the competitive viability of the independent sector of the petroleum industry is maintained.

Moreover, the existing complicated structure of price controls at all levels of distribution, which is necessitated due to the existence of the cost disparities resulting from the two-tiered price system, tends to be self-defeating over the long run by reducing normal incentives toward increased production and cost control and by eliminating the ability of the industry to engage in long range business planning. As effectiveness of price control lags over time, regulations of greater complexity and reach become necessary to maintain the controlled-price structure. Tightening of controls tends to further stifle initiative and to contribute to greater economic distortion.

The FEA recognizes that this proposal must be implemented in a manner which will minimize any adverse impact on national economic recovery. The FEA proposes, therefore, that the ceiling price on old crude oil be eliminated gradually, primarily by reducing the amount of "base production control level crude petroleum" for each property by 4 percent every month for the next 25 months.

The FEA also recognizes that this price decontrol proposal may not be implemented until the requirements of section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973, as amended, are complied with. Section 4(g)(2) of that Act restricts authority to promulgate administrative exemptions by requiring submission to Congress of proposed exemptions prior to implementation and providing that proposed exemptions may not be implemented if disapproved by either house of Congress during the period of five sessional days allowed under section 4(g)(2) for legislative review. The FEA therefore pro-

poses to submit this exemption proposal for congressional review pursuant to section 4(g)(2) of the Act after rulemaking proceedings have been completed and FEA has received the benefit of comment and suggestions from interested segments of the public.

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to this matter to Executive Communications, Room 3309, Federal Energy Administration, Box DA, Washington, D.C. 20461. Comments are invited both with respect to the nature and scope of the proposed amendments and the proposed method of phased implementation.

Comments should be identified on the outside of the envelope and on documents submitted to FEA Executive Communications with the designation "Phase-Out of Old Oil Price Ceilings." Fifteen copies should be submitted. All comments received by May 14, 1975, before 4:30 p.m., e.d.t., and all other relevant information will be considered by the Federal Energy Administration before the final action is taken on the proposed regulations.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. The FEA reserves the right to determine the confidential status of the information or data and to treat it according to that determination.

The public hearing in this proceeding will be held at 9:30 a.m., e.d.t., on May 13, 1975, and will be continued, if necessary, on May 14, 1975, in Room 2105, 2000 M Street NW., Washington, D.C. 20508, in order to receive comments from interested persons on the matters set forth herein.

Any person who has an interest in this matter, or who is a representative of a group or class of persons that has an interest in this matter, may make written request

for an opportunity to make oral presentation. Such a request should be directed to Executive Communications, FEA, and must be received before 4:30 p.m., e.d.t., on May 8, 1975. Such a request may be hand delivered to Room 3309, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. The person making the request should be prepared to describe the interest concerned; if appropriate, to state why he is a proper representative of a group or class of persons that has such an interest; and to give a concise summary of the proposed oral presentation and a phone number where he may be contacted through May 12, 1975. Each person selected to be heard will be so notified by the FEA before 4:30 p.m., e.d.t., May 9, 1975, and must submit 100 copies of his statement to Executive Communications, FEA, Room 2214, 2000 M Street NW., Washington, D.C. 20508, before 4:30 p.m., e.d.t., on May 12, 1975.

The FEA reserves the right to select the persons to be heard at these hearings, to schedule their respective presentations and to establish the procedures governing the conduct of the hearings. The length of each presentation may be limited, based on the number of persons requesting to be heard.

An FEA official will be designated to preside at the hearings. These will not be judicial or evidentiary-type hearings. Questions may be asked only by those conducting the hearings, and there will be no cross-examination of person presenting statements. Any decision made by the FEA with respect to the subject matter of the hearings will be based on all information available to the FEA. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity, if he so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any interested person may submit questions, to be asked of any person making a statement at the hearings, to Executive Communications, FEA, before 4:30 p.m., e.d.t., May 12, 1975. Any person who wishes to ask a question at the hearings may submit the question, in writing, to the presiding officer. The FEA or the presiding officer, if the question is submitted at the hearings, will determine whether the question is relevant, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearings will be announced by the presiding officer.

A transcript of the hearings will be made and the entire record of the hearings, including the transcript, will be retained by the FEA and made available for inspection at the Administrator's Reception Area, Room 3400, Federal Building, 12th and Pennsylvania Avenue, NW., Washington, D.C., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

As required by section 7(c)(2) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, a copy of this notice has been submitted to the Administrator of the Environmental Protection Agency for his comments concerning the impact of this proposal on the quality of the environment. The Administrator had no comments on this proposal.

The inflationary impact of this proposal has been considered by the FEA, consistent with Executive Order 11821, issued November 27, 1974.

(Emergency Petroleum Allocation Act of 1973, as amended, Pub. L. 93-159, as amended by Pub. L. 93-511! Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185.)

In consideration of the foregoing, it is proposed to amend Part 212, Chapter II of Title 10 Code of Federal Regulations, as set forth below.

Issued in Washington, D.C., April 30, 1975.

ROBERT E. MONTGOMERY, Jr.,
General Counsel,
Federal Energy Administration.

1. Section 212.72 is revised to add, in appropriate alphabetical order, a definition of "decontrolled crude petroleum" as follows:

§ 212.72 Definitions.

* * * * *

"Decontrolled crude petroleum" means an amount of crude petroleum equal to the base production control level crude petroleum for a particular month for a particular property multiplied by 4 percent and multiplied by the number of months beginning with June 1975, through the current month.

* * * * *

2. Section 212.74 is revised to read as follows:

§ 212.74 New, released and decontrolled crude petroleum.

Notwithstanding the provisions of § 212.73(a), a producer of crude petroleum may sell in each month, without respect to the ceiling price, the new crude pertroleum, the released crude petroleum, and the decontrolled crude petroleum produced and sold from a property in that month.

[FR Doc. 75-11701 Filed 5-1-75; 8:45 am]

Title 10—Energy

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

PART 211—MANDATOR PETROLEUM ALLOCATION REGULATIONS

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Phase-Out of Old Oil Price Ceilings

A. INTRODUCTION

The Federal Energy Administration hereby adopts an amendment to its regulations to provide for the gradual removal of price controls from domestic crude oil. This amendment is being submitted to the Congress for its review pursuant to section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973. Unless disapproved by either house of Congress during the five day period allowed for legislative review, the amendment will decontrol "old" crude oil (now subject to a ceiling price averaging $5.25 per barrel) at the rate of 3.3 percent a month over a 30-month period ending January 31, 1978.

The amendment also provides for a new ceiling price for all domestic crude oil other than stripper well crude oil) to be in effect during the 30-month decontrol period equal to the highest price charged for uncontrolled domestic crude oil produced from the particular property concerned in the conth of January, 1975, plus $2.00 per barrel, or a total of approximately $13.50 per barrel. This ceiling, which approximates the present world price level plus the $2.00 per barrel supplementary import fee, will prevent any future crude oil price increases by OPEC from triggering still higher domestic crude oil prices.

This proceeding was initiated on April 30, 1975, when the Federal Energy Administration issued a notice of proposed rulemaking and public hearing (40 FR 19219, May 2, 1975) to amend Part 212 of Title 10 of the Code of Federal Regulations to phase out over a 25-month period all price controls on crude oil at the producer level.

Fifty-nine written comments were received in response to the notice of proposed rulemaking before the close of the period for receipt of such comments. Oral presentations were made by 29 persons at the public hearings held on May 13 and 14, 1975. All these comments and presentations were considered by the FEA, and certain modifications in the proposed amendments have been made, to arrive at the final amendment adopted today, reflecting FEA's consideration of these comments and presentations as well as other information available to FEA. These modifications included in the decontrol rule now promulgated are discussed in section E, below.

B. Background

The petroleum industry has been subject to various forms of price controls since 1971, a period of about four years. When the general Phase IV price controls ended on April 30, 1974, with the expiration of the Economic Stabilization Act of 1970, the only industry which remained subject to price controls (as administered by the FEO and subsequently the FEA) was the petroleum industry.

The reason for continuing price controls on the petroleum industry was, of course, the serious shortage of crude oil and products derived therefrom in late 1973 and early 1974. In response to this emergency situation, the Emergency Petroleum Allocation Act of 1973 was enacted in November, 1973, pursuant to which price controls on the sale of crude oil and derivative products have been retained.

As its name suggests, that Act was chiefly concerned with assuring adequate supplies through regulatory mechanisms by which covered products would be equitably allocated to all regions and to all users throughout the product distribution chain. Price controls were retained to further assure that reduced supplies would not lead to inequitably high prices.

At present, about one-third of total domestic production of crude oil is not subject to the ceiling price of 10 CFR 212.74. This amount represents crude oil which is under the congressionally-mandated stripper well lease exemption and crude oil which is allowed to be priced at market levels under existing production-incentive regulations concerning "new" and "released" crude oil. Taking into account imported crude oil, about 56 percent of all domestically refined crude oil is not subject to price ceilings.

Domestic crude oil subject to price ceilings, defined as "old" crude petroleum, sells at an average of $5.25 a barrel (or about 12½ cents a gallon), while the average price of uncontrolled domestic crude oil rose from about $11.30 a barrel in January, 1975, prior to the increase in import fees, to a current level of about $12.25 (29 cents a gallon).

The Emergency Petroleum Allocation Act of 1973 permits exemptions from allocation and price controls for products subject to the Act to be granted only under certain conditions. An exemption may apply to only one product and may extend for a period of not more than 90 days. Any proposed exemption must be submitted to Congress prior to implementation, together with findings that (1) there is no shortage of the product concerned, (2) the proposed exemption will not have an adverse effect on the supply of any other product, and (3) controls on the product concerned are no longer necessary to carry out the purposes and goals of the Act. Pursuant to section 4(g)(2) of the Act, the exemption may not be imple-

mented if disapproved by either house of Congress during the period of five sessional days allowed by the Act for legislative review by each house.

Having received written comments and having held public hearings on its old oil deregulation proposal, the FEA has transmitted this final decontrol amendment to the Congress together with the findings set forth below. Under the amendment adopted today, old oil will be gradually decontrolled over a 30-month period, beginning immediately upon expiration of the five-day period prescribed in section 4(g)(2) of the EPAA and ending on January 31, 1978. The FEA plans to issue a notice before August 1, 1975, stating what congressional action, if any, was taken under section 4(g)(2) and, if this amendment was not disapproved by either house of Congress within the period provided by Section 4(g)(2), the date this amendment became effective.

The rate of decontrol of old oil will be at 3.3 percent for each month from August, 1975, through January 31, 1978. Since it appears that the five-day legislative review period prescribed in the Act will expire on or about July 23, 1975, one percent of old oil will also be decontrolled for the month of July, 1975, to achieve the same rate of decontrol for approximately one-third of the month of July remaining after the effective date of the amendment. Because crude oil is generally produced and sold to the same purchaser in a continuous flow for an entire month, with prices under the two-tier system calculated for the month concerned in the subsequent month, the only practicable method for determining the amount of old oil to be decontrolled under this amendment for the remainder of the month of July is to determine a decontrol rate for July which bears the same approximate ratio to the 3.3 monthly percentage rate that the number of days remaining in July after the amendment becomes effective bears to the total number of days in July. The purpose of FEA in this respect is to avoid retroactive application of the amendment adopted today while assuring that the impor-

tant national benefits of decontrol will begin to accrue at the earliest possible date.

As explained in the notice of proposed rulemaking issued April 30, 1975, the FEA's "old oil" decontrol program (which implements one phase of the overall energy conservation program put forward by President Ford in his State of the Union Message) would affect only crude oil sales at the producer level. It would not affect the crude oil allocation regulations or the allocation or price regulations for any other product at any level of distribution. The old oil decontrol program would both help curb domestic consumption and spur domestic production, thus furthering the important national goal of reducing dependence on imported crude oil.

Decontrol will ultimately permit all domestic crude oil prices to rise to the current prevailing world price levels, so that the demand-dampening effects which have been felt world-wide would be felt to the full extent in the United States. Under the two-tiered price system now in effect, the price of most domestic oil is held at a level less than half that of current world price levels, so that the impact which the escalation of world market prices has had on demand elsewhere in the world has been considerably cushioned in the United States.

In addition to conserving domestic supplies by reducing demand, decontrol of domestic crude oil prices would stimulate domestic production, or at least greatly reduce the rate of decline in domestic production, displacing some supplies of crude oil that would otherwise have to be imported. Measures to promote maximum domestic production of crude oil—especially new exploration and drilling activity and implementation of secondary and tertiary recovery techniques—are considered essential in order to help assure adequate and dependable energy resources for the United States until alternative domestic

energy resources can be developed over the long term. Furthermore, the FEA has found that the production incentives afforded by the rules permitting "new" and "released" domestic crude oil to be sold at free market prices are of decreasing impact or effectiveness, as production levels, because of natural rates of decline, are generally falling further below 1972 levels, and 1972 levels of production for a property must be exceeded before the new and released price rules can have any effect.

Thus, many producers, especially those whose current production levels are substantially below the 1972 base levels and are further declining under primary recovery techniques, remain unaffected by the incentives presently afforded because those incentives are too remote to outweigh the cost of implementing the substantial secondary or tertiary recovery programs which would be necessary to bring production up to and above the 1972 base levels. Under the FEA decontrol program, when fully implemented, all production, including additional production, would bring the higher prices now available to uncontrolled oil.

The existing incentives to increase production are, for properties that were producing in 1972, only effective for limited periods of time in any event, since the inevitable slackening of output will eventually bring production below 1972 levels, to the point where existing incentives are no longer adequate to encourage investment in secondary/tertiary recovery and other costly programs designed to increase total output of crude oil. Although the additional incentive afforded by the gradual decontrol of old oil would also eventually diminish in effect with respect to existing properties, due to the inevitable decline or exhaustion of work-over reservoirs, the purpose of decontrol is not to provide a permanent solution to limited domestic production capabilities. Rather, it is intended simply to provide incentives of sufficient effectiveness and duration

as will yield maximum levels of domestic production until such time as supplementary energy resources can be developed and exploited. Although existing incentives are believed to have contributed substantially to the current reduction in the rate of decline in domestic production, FEA believes that existing incentives clearly cannot work to maintain domestic production at levels now thought necessary to avoid an unacceptable degree of reliance on imported fuels over the next few years.

As also noted in the April 30, 1975, notice of proposed rulemaking, an additional benefit of decontrol of domestic crude oil will be the elimination of economic distortions caused by the present two-tiered pricing system. The two-tiered pricing system inevitably causes cost disparities among refiners and marketers of petroleum products. Although these cost disparities have been substantially reduced by the crude oil entitlements program, they can never be entirely eliminated while the two-tiered pricing system exists. Such cost disparities significantly hinder FEA's ability to assure that the competitive viability of the independent sector of the petroleum industry is maintained.

Moreover, the existing complicated structure of price controls at all levels of distribution, which is necessitated in large measure by the existence of cost disparities resulting from the two-tiered price system, tends to be self-defeating over the long run by reducing normal incentives toward increased production and cost control, and by eliminating the ability of the industry to engage in long range business planning. As effectiveness of price controls lags over time, regulations of greater complexity and reach become necessary to maintain a controlled-price structure. And tightening of controls, in turn, tends further to stifle initiative and to contribute to greater economic distortions.

C. FINDINGS

1. *There is no shortage of crude oil.* As FEA representatives have previously testified at congressional hearings, there is currently no shortage of crude oil available to U.S. refiners. Worldwide production capability substantially exceeds current demand. U.S. refiners have been able to obtain from foreign sources all requirements needed to fill the domestic production shortfall. Inputs to U.S. refineries, which dropped markedly during the first three months of 1974, now exceed pre-embargo levels. Domestic crude oil inventories have also increased, and exceed pre-embargo levels.

The level of crude oil production in the OPEC countries continues to decline due to reduced demand. At the end of March, 1975, output was 25.72 million barrels/day (b/d), compared to 28.85 million b/d at the start of 1975, a drop of 11 percent. These production figures represent 66 percent of OPEC's currently estimated producing capacity of 39 million b/d.

U.S. petroleum inventory and import estimates for late April 1975 show an inventory-to-import ratio of approximately 167 days. This is considerably higher than the 123 days of stocks available in April 1974. Petroleum stocks were approximately 852 million barrels at the end of April 1975 and 815 million barrels at the end of April 1974, an increase of 4.5 percent. Imports for the same periods were approximately 5.1 and 6.6 million barrels per day respectively, a decrease of 23 percent.

The general availability of crude oil to meet U.S. demands is also demonstrated by current data concerning the FEA allocation programs. For example, allocation fractions for all major refined products and residual fuel oils are at or close to 1.0, generally indicating that crude oil is in sufficient supply to meet virtually all demand for refined and other products derived from crude oil. While supplies of propane are not always adequate to meet de-

mand in all regions of the U.S., such shortage problems as occur relate principally to the fact that most propane is produced from natural gas rather than crude oil, and there has been a decreasing supply of natural gas.

In addition, activity under the FEA's crude oil allocation program has slackened during recent quarters. The buy-sell program in its current form enables small and independent refiners to obtain crude oil supplies from the major refiners to supplement their own supplies. The fact that more and more small and independent refiners are obtaining their supplemental crude oil supplies through normal market channels further indicates the general availability of crude oil at all levels and in all regions of the U.S.

2. *The proposed exemption will not have an adverse impact on the supply of any other oil or refined petroleum products subject to the Act.* Under today's conditions, 20 months after passage of the Act, national policy requires that dependence on imported crude oil be reduced. This can be done by stimulating domestic crude oil production and by curbing demand for residual oil and refined petroleum products. The proposal to decontrol old oil is an important step toward a greater degree of self-sufficiency in meeting our energy needs.

To the extent that decontrol contributes, as expected, to stimulate domestic crude oil production by encouraging increased exploration and drilling activity and the use of secondary and tertiary recovery techniques, decontrol obviously tends to enhance rather than adversely affect the supply of products derived from crude oil. To the extent that higher prices resulting from decontrol dampen demand, as expected, decontrol will also tend to increase rather than reduce supplies of petroleum products.

Increased production and reduced demand brought by decontrol will not result in any domestic surplus of crude

oil. It is expected that the result will be an offsetting decrease in the amount of crude oil or refined product that would otherwise be imported to meet domestic needs. To this extent, decontrol will not change the overall availability of petroleum products in this country. However, because domestic crude oil is a more reliable source of crude oil for production of petroleum products than is imported crude oil, decontrol will tend to have a beneficial rather than adverse impact on the nature of the domestic supply of petroleum products subject to the Act.

3. *Price controls on crude oil are not necessary to carry out the Act.* All of the purposes and goals of the Act are predicated upon alleviating the emergency conditions resulting from shortages of crude oil, residual fuel oil and refined petroleum products which were being experienced or appeared imminent when the Act was made law late in 1973. As indicated in Finding 1, shortages of crude oil no longer exist. Inasmuch as the underlying condition to which the purposes and goals of the Act generally relate is no longer present, the necessity of price controls on old oil to carry out the Act is no longer apparent.

The express purpose of the Act, as stated in section 2(b), is to grant to and direct the President to exercise "specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." The specific goals to be reached by exercise of the authority granted under the Act, as set forth in section 4(b)(1), may be placed in the following groupings: (a) To protect the general welfare and the national defense; (b) to maintain residential heating, public services and agricultural operations; (c) to preserve an economically sound and competitive petroleum industry; (d) to allocate crude oil in order to permit refineries to operate at full capacity; (e) to provide for equitable distribution of crude oil, residual fuel oil and refined petroleum products at equitable prices among all regions and among all

users; (f) to allocate residual fuel oil and refined petroleum products in order to maintain exploration and production or extraction of fuels; and (g) to provide for economic efficiency and minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms.

The decontrol of old oil prices should serve to further the goals indicated in items (c) and (g), above, under present conditions. The economic inefficiencies and distortions brought about by price controls when they are extended over a long period of time are discussed in section B, above. In addition, the gradual removal of price controls during a period of adequate supply should lead to improvement in the economic position of the petroleum industry and stimulate resumption of normal competitive conditions. These results are particularly desirable in view of the major effort which will be required to alter the trend of declining U.S. crude oil production.

The adequacy of supply under current conditions means that the threat to the national security and welfare posed by an existing or imminent shortage of crude oil no longer exists. Price controls on crude oil are therefore no longer necessary to achieve the short-term goals of the Act concerning protection of the national defense and public welfare (item (a)). For the longer term, removal of price controls should have a favorable effect on the national defense and public welfare. As the Secretary of Treasury found in connection with the President's Proclamation regarding imposition of import fees, the heavy reliance by the United States on imported crude oil poses a significant threat to the national security. As noted above, the decontrol of old oil prices should over the long run significantly reduce reliance on foreign sources of oil.

The goals indicated in items (d) and (f) relate primarily to the allocation program or to petroleum products other than crude oil. These goals are therefore not di-

rectly affected by the proposal to decontrol the price of old oil.

The goals in item (b) address the threat to adequate supplies of fuel for residential heating, public services and agricultural operations resulting from imminent crude oil shortages. This threat was countered primarily by the allocation of crude oil used to produce fuels for these needs, and by the allocation of these fuels themselves. This fact, plus the current absence of any shortage of crude oil, leads to the conclusion that price controls on crude oil are no longer necessary to achieve the goals of the Act relating to maintaining adequate fuel supplies for residential, public service and agricultural needs.

The goal of providing for "equitable distribution of crude oil * * * at equitable prices among all regions and * * * all users" (item (e)) is one which is clearly predicated upon the existence or imminence of a serious crude oil shortage situation. When supplies are short, normal market mechanisms may not assure equitable distribution of supplies across the country and do not prevent price gouging and other shortage-related pricing abuses. In other words, the goal of "equitable prices" should not be isolated and read out of context as mandating permanent price ceilings, even when supplies of crude oil are adequate to permit normal market mechanisms to function. In the absence of shortages of crude oil, therefore, price controls on crude oil are not necessary to carry out the goal of equitable distribution at equitable prices.

In addition, FEA believes that "equitable" prices, within the meaning of Section 4(b)(1)(F) of the Act, will be achieved by restoring normal market mechanisms during a period of adequate supply and by eliminating economic distortions caused by the current two-tier pricing system. However, to the extent that a return to normal market mechanisms at this time would bring prices on crude oil to levels which might be viewed in

certain sectors of the economy as inequitably high because they result in higher prices on certain petroleum products, this view is outweighted by the need to achieve other objectives of the Act and by other considerations, including the fact that decontrol is being phased in gradually and the availability of legislative measures to alleviate, through tax relief or rebates, the impact of price increases on consumers and other sectors of the economy.

On the basis of all the foregoing considerations, the FEA concludes that price controls on crude oil are not necessary to carry out the Act.

Comments on Old Oil Decontrol Proposal

Comments in opposition to the FEA old oil decontrol proposal generally reflected the following arguments:

1. *The argument that U.S. crude oil price levels should be based on production costs and not reflect arbitrary OPEC pricing decisions.* The FEA decontrol program permits old oil prices ultimately to rise to the vicinity of current prevailing world market prices, plus the supplementary import fee of $2.00 per barrel. Some commentators who opposed the FEA decontrol program generally felt that the world price was artificial and therefore unnecessarily high and might go higher, resulting in still higher domestic prices for decontrolled crude oil. In order to provide appropriate incentive toward increased domestic production, it was proposed that the old oil price ceiling be retained but set at some higher intermediate level, such as $7.50, $8.50 or $10.00 a barrel.

While no indisputable conclusions in this matter are possible, it is clear that current world price levels, including the supplementary import fee, do not exceed the point at which further price increases cannot be expected to bring significant returns in terms of increased crude oil production. In the view of FEA, decontrol at prices up to current world price levels (plus U.S. import fees) will

effectively stimulate domestic production and over time substantially reduce our dependence on imported oil. Nevertheless, in order to be responsive to the concern that further OPEC price increases could result in further domestic price increases above those levels providing the maximum useful production incentives, the amendment adopted today imposes an ultimate ceiling on domestic crude oil prices.

It should be remembered in this connection that the great bulk of new domestic production of crude oil will come not from traditional production techniques within the contiguous portions of the continental United States but from more sophisticated and expensive production techniques within this area, or from the continental shelf and remote areas of Alaska. Most offshore production is expected to come from previously untapped areas of the Atlantic and Pacific rather than from the more familiar and tested reaches of the Gulf of Mexico. These considerations all point to the need for new technologies, heavier investment burdens, greater risks and greatly increased costs of production.

In addition, the potential exists for substantial new recoveries from worked over "onshore" reservoirs provided technology for secondary and tertiary recovery is further developed or existing technology becomes economically feasible as prices rise. While not as costly as recovery from offshore and Alaskan frontiers, recovery utilizing secondary/tertiary recovery techniques is generally substantially more costly than primary recovery.

Unfortunately, the level of incentive needed to induce high-risk exploration and cost estimates for successful development projects vary considerably due to the substantial uncertainties connected with exploration and ultimate recovery from remote and unhospitable regions and considerable doubt as to future rates of inflation. Thus, even if costs could be projected with great precision, necessary incentives for increased production could

not be provided by setting prices which merely covered costs. While producers acknowledge that current uncontrolled domestic crude oil price levels provide sufficient incentive to produce new oil, nevertheless as long as three-fifths to two-thirds of production must be sold at the old oil price ceiling of approximately $5.25 per barrel, cash flow, together with other sources of capital, will not be adequate to generate enough capital to finance exploration and development of new oil, no matter what price it may be expected to bring. This problem is of even greater urgency now that tax reform has removed the depletion allowance as a means of accumulating capital for exploration and development.

In this connection, comment provided by oil producers indicates that while industry profits were high in 1974, profits for the first quarter of 1975 have dropped to an average of about two-thirds of the level of the first quarter of 1974. On an annualized basis, this level of profit would produce a return on stockholder equity of 10.5 percent. For the ten-year period prior to 1974 the rate of return on stockholder equity was 11.4 percent for the petroleum industry compared with 11.6 percent for all manufacturing. These figures tend to support the view that the high profit levels of 1974 were not typical, and were the result of short-term non-recurring forces. According to industry comments, the steep decline in industry profits this year, while attributable in large degree to the change in the depletion allowance, significantly exceeds the decline attributable to that change.

Management decisions as to capital needs and adequacy of price incentives necessarily rest with producers and, unless control of oil production is to be assumed by the government, oil firms cannot be forced to develop and market additional amounts of crude oil, even if price levels deemed "adequate" by FEA or Congress were to be adopted. Several commentators made reference in this connection to the serious decline in natural gas produc-

tion that has occurred under long-term federal price regulation.

Taking into account both FEA and industry estimates, adequate incentive for development of new "onshore" crude oil (i.e., enhanced recovery from traditional domestic reservoirs by secondary/tertiary methods) is currently estimated at between $7.00 to $10.00 a barrel; for development of new oil from Alaska and offshore or continental shelf regions, at between $7.00 to $12.00 a barrel; for development of oil from shale, at between $12.00 to $15.00 a barrel; for development of oil from coal, at about $18.00 a barrel. This array of estimates suggests that if imports are to be held at acceptable levels by substituting significant amounts of new domestic production, it will be both necessary and appropriate to allow prices to rise to the vicinity of currently prevailing world market levels.

The foregoing estimates are generally supported by estimates provided to FEA by other sources. For example, industry data submitted by the Society of Petroleum Engineers indicates that cost of developing and producing a barrel of crude oil in 600 feet of water in the North Atlantic and North Pacific is 3.5 times the cost at the same depth in the Gulf of Mexico, while the cost in the Gulf of Alaska may range up to six times that in the Gulf of Mexico. Lag times are more than twice as great in these frontier areas. In addition, an independent economist testified before a congressional committee that the replacement cost or "economic cost" of domestic crude oil reached a level of $12.73 a barrel in 1974. The high cost of finding "replacement" barrels of crude oil for those we consume today must be financed, in the main, by profits earned on the barrels sold today.

In the opinion of FEA, the task which the nation faces is one of providing sufficient incentives to private industry to develop, to the maximum extent possible and as quickly as possible, additional domestic crude oil resources

which will reduce dependence on unreliable foreign crude oil. Revival of domestic production will require a major undertaking in frontier regions at high cost. A decision to offer maximum incentives and to pursue maximum efforts to this end is our own decision and not one dictated by foreign pricing policies.

2. *The argument that decontrol would impose too great a burden on the consumer.* Most commenting refiners stated that old oil decontrol would result in an average price increase of 5 cents or 6 cents per gallon of petroleum product. Suggesting that actual dollar cost increases to the consumer would be within manageable limits, Exxon commented that gasoline prices today are below 1950 levels, in terms of constant dollars, and would remain so even if old oil decontrol were effected immediately. Other comments either directed attention to "ripple effects" or noted that the cost was a small price to pay for greater energy independence.

FEA assessment if impact on the consumer indicates that the average retail price increase attributable to decontrol by the end of this year would be only about 1 cent per gallon of petroleum product. This fact illustrates that the program to phase out crude oil price controls over a 2½ year period will substantially diminish the impact of decontrol on consumers. FEA estimates that the total retail price increase attributable to decontrol over the 2½ year period will be approximately 7 cents per gallon of petroleum product.

The FEA assessment of impact on the consumer also takes into account the intangible but real benefits which would accrue to the public at large through increased national economic security brought by lessened dependence on unreliable foreign crude oil sources, improved balance of payments position, revived domestic industrial production and new jobs in the petroleum industry. In addition, the "windfall profits" tax on oil producers' excess revenues proposed by the President would yield tax

receipts which would be used to provide direct rebates to energy consumers. These factors mitigate to a significant extent the actual dollar cost to consumers.

On the other hand, the FEA is aware that prices on such products as home heating oil are already very high and that further increases could impair the ability of certain consumers (particularly the aged and the poor) to pay heating bills, despite the gradual nature of the FEA decontrol program and tax relief. Specific legislative proposals, such as a home insulation tax credit, have been proposed to the Congress to minimize the impact that relatively higher energy costs, including costs of home utilities, will ultimately have on various sectors of the economy.

However, the FEA considers the immediate adoption of this gradual crude oil decontrol program of such overriding national importance that no further delay can be justified. FEA believes this action to be consistent with the admonition in the Conference Report on the Emergency Allocation Act of 1973 that in exercising authority under that Act it would be necessary to "strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply and of holding down spiraling consumer costs."

3. *The argument that decontrol will not reduce demand.* Several comments were received which stressed that consumers have already "dialed down" and taken all other available conservation steps, and that no further realistic anticonsumption measures are available, particularly to the homeowner. According to this view, the decontrol program would therefore merely squeeze the consumer.

While the FEA acknowledges that many useful conservation measures in home heating (except perhaps major insulation efforts) were instituted last year, never-

theless comments with respect to inelasticity of demand are not borne out by the demand responses experienced with respect to past price increases.

The decontrol program will contribute to the long-term goal of reducing dependence on unreliable foreign crude oil and the benefits of achieving that goal must therefore be measured on a long-term basis. The FEA position that increased prices of domestic crude oil will dampen demand domestically is based on the realistic assumption that higher fuel prices in the long run will inevitably result in or contribute to smaller and/or more efficient automobiles, more efficient home heating systems, increased construction and use of public transportation systems, and more efficient use of fuels in commerce and industry. All of these will contribute to contracting energy demand.

Moreover, means are available for easing short-term problems relating to demand reduction. The President has consistently urged that appropriate legislative action be taken to ease the burden on consumers of the transition to an economic system based on relatively higher costs for energy than have been experienced in the past. The FEA will continue to work actively in seeking to solve transitional consumer problems.

4. *The argument that decontrol of crude oil should not be undertaken unless natural gas prices are deregulated simultaneously.* A number of petroleum marketers stated that they would not support the FEA decontrol program unless natural gas prices were decontrolled at the same time. Understandably, marketers of petroleum fuels are concerned that they will lose a share of their fuel markets to natural gas marketers if petroleum fuels become increasingly noncompetitive in price.

To some degree the concern of petroleum marketers in this respect may be exaggerated. The present short supply of natural gas is expected to become more critical in

the coming months, so that it is most unlikely that many consumers will be able to substitute natural gas for petroleum fuels even if the latter become more expensive. Only if Congress acts to decontrol natural gas prices substantially in advance of implementation of a program to decontrol crude oil prices could there be an expansion of natural gas supplies sufficient to permit inroads into the petroleum fuels market. In that event, of course, natural gas prices would have begun to climb before those of petroleum fuels, so that the petroleum marketers would be in a relatively better competitive position.

The FEA agrees that many of the same reasons which support decontrol of crude oil prices support decontrol of natural gas price levels. However, regulation of natural gas prices is not within the jurisdiction of FEA. In exercising its responsibilities under the Emergency Petroleum Allocation Act of 1973, the FEA must move forward to develop policies and programs within its mandate, while recommending for congressional action complementary measures which are beyond FEA authority to implement.

Congress has under active consideration proposals to deregulate the prices of natural gas. In view of the urgency of taking steps now to alter the trend toward increased imports of crude oil, and in view of the gradual phase-out approach of the FEA decontrol program, the FEA believes it is appropriate to commence gradual decontrol of old oil price ceilings without waiting for final congressional action on natural gas prices.

The FEA recognizes that the Emergency Petroleum Allocation Act of 1973 places special emphasis on protecting the competitive viability and market share of independent marketers, to the maximum extent practicable and consistent with the other objectives of the Act. FEA will therefore maintain a continuing review of the market shares of home heating oils versus competing fuels to

insure that decontrol of crude oil does not have a significant adverse impact on independent marketers.

5. *The argument that decontrol of crude oil should not be undertaken until a "windfall" profits tax is enacted.* For the reasons given under argument number 4 above, the FEA believes that the decontrol program must begin now, without further delay. Action on a "windfall" profits tax can be completed within the next few months by Congress without disrupting an orderly administrative decontrol program. Increases in producer revenues will be gradual under the phased decontrol schedule, and in any event a new profits tax may be imposed retroactively.

6. *The argument that decontrol by FEA would harm the airline industry, in controvention of one of the goals of the EPAA.* Representatives of the airline industry commented that U.S. airlines, already in financial difficulty because of the increases in jet fuel prices in 1974 and the effects of the recession on airline travel, would be further adversely affected by another round of fuel price increases brought about by decontrol.

The airline industry takes the position, in effect, that decontrol should not be permitted to proceed because it would impair public air transportation in contravention of one of the goals of the Emergency Petroleum Allocation Act.

The FEA recognizes that one of many express goals to be achieved by the allocation and price regulations promulgated under the Emergency Petroleum Allocation Act of 1973 is to "provide for maintenance of all public services * * * including transportation facilities." However, the concern of Congress in this respect was directed to the adequacy of supplies to keep transportation systems running. This is clearly shown by the following specific discussion of air transport problems in the Conference Report on the Act.

> The petroleum fuel shortage threatens numerous areas of commerce. The jeopardy from shortage of these fuels impacts most directly on transportation. Without adequate petroleum fuel most United States' domestic and international transportation, with no option to convert to other fuels, potentially would be seriously disrupted. A significant reduction of transportation capability could adversely affect all other areas of commerce and the national economy. Thus, one of the primary objectives of the Act is to assure maintenance of transportation services.

The Act clearly does not require the "maintenance" of price ceilings on certain petroleum products purchased by a particular industry.

Moreover, each of the many goals listed in § 4(b) of that Act is qualified by the proviso that the allocation and price regulations need provide for those goals only "to the maximum extent practicable." In explaining why this qualification was included, the Conference Report stated, "It is fully recognized that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another." The qualification was thus intended, according to the Report, "to give the President administrative flexibility in marshalling short supplies and equitably assigning them to particular needs."

Therefore, even if FEA were to agree with the airline industry's view that decontrol does not fully meet one of the many sometimes conflicting objectives under the Act, this would not overcome the FEA's conclusion as to the overriding need to proceed with this decontrol program—a program designed to reflect the present adequacy of supplies and to begin on a gradual basis to restore the petroleum industry to normal functioning.

The FEA is sensitive to the special problems which face the airline industry and other public service industries due to energy cost increases. The change from a 25 to a 30-month phase-out schedule should serve to reduce the

impact of decontrol on industries which are especially dependent on petroleum fuels. The FEA is prepared to discuss with any industry or affected group other ways in which adverse effects under the decontrol program can be minimized.

E. Rule Modification

1. *Length of phase-out period.* A great variety of suggestions were received for changing the 25-month period for decontrol proposed by FEA in its notice of proposed rulemaking in this matter. These ranged from requests for immediate decontrol, to decontrol over a 5-10 month period, to decontrol over a 4- or 5-year period. However, many commentators indicated that they would be willing to accept the FEA proposal on this issue as a compromise or second choice.

Those who proposed a longer period for phase-out were chiefly concerned with minimizing or softening the impact on the economy or on consumers, in particular. Those proposing a shorter period stressed either the need to remove the economic distortions and other deleterious effects of controls as soon as possible or the need to achieve a greater degree of national self-sufficiency in crude oil at a more rapid pace.

The FEA must, of course, strike a balance between these opposing considerations or concerns. The FEA believes that a somewhat more gradual decontrol pace, at the rate of 3.3 percent a month for 30 months (after decontrol of one percent for the month of July, 1975), represents a reasonable balance on this issue. This will mean that the decontrol process would extend to February 1, 1978, compared with August, 1977, under the 25-month proposal and August, 1980, under the decontrol proposal contained in H.R. 7014 as recently reported out of the House Commerce Committee. This phase out program, once placed in motion, will permit planning and mobilization for long range exploration and development of new

domestic crude oil resources to begin immediately. At the same time, the 30-month phase-out schedule appears to provide an appropriately gradual mechanism to minimize the impact on the economy.

2. *Requirement of maximum feasible rates of production.* Comments were received which expressed concern that the decontrol program, as proposed, might have the unintended result of reducing production temporarily if producers held back on production until the end of the phase-out period, when all crude oil could be sold at uncontrolled price levels.

In view of this possibility, the FEA has decided to adopt generally the same express requirement now applicable by its terms only to the stripper well lease exemption, which requires production to be maintained at maximum feasible rates of production. The FEA believes this requirement is appropriate to assure that the purpose and intent of the decontrol program are not circumvented. The requirement is also fully consistent with the main purpose of decontrol, which is to maintain and increase current levels of domestic production as rapidly as possible. Any holding back would defeat this purpose and would also defeat the effort to minimize adverse effects on the economy by phasing out controls on a gradual basis.

3. *Decontrol base level.* Under the proposed rule the amount of decontrolled oil would have been calculated as a percentage of the base production control level crude petroleum (i.e., 1972 production) rather than as a percentage of the old oil currently being produced. It was pointed out to FEA that inasmuch as 1972 production levels are generally greater than current production levels, the monthly decontrol volume would be correspondingly larger if the amount of decontrolled oil were to be calculated against a 1972 base. This would mean that the old oil produced from a property would be decontrolled in a period of less than 25 months, to the extent that its

current production was at less than 1972 levels. Thus, the overall decontrol program, as proposed, would have extended to the end of that 25-month period, and would have affected for the full 25 months (as proposed) those properties which continue to produce at 1972 levels, but would have decontrolled properties producing at less than 1972 levels before the end of that period.

In order to clarify this ambiguity concerning the phase-out schedule and in order to assure a full 30-month phase-out for all properties which continue to be productive, the FEA has concluded that it would be preferable to calculate the amount of decontrolled crude oil on the basis of a recent level of old oil production rather than on the basis of the 1972 base level production.

The FEA has also concluded that, in view of the urgent need for increased domestic production of crude oil, the modified decontrol amendment should provide production incentives for all properties, at all levels of production. As discussed in Section B, above, existing production incentives relating to "new" and "released" crude oil are not effective to encourage additional production in many cases where current production has declined substantially below 1972 base levels. Gradual decontrol of old oil based on the current month's production would not directly stimulate additional production in these cases, since such a decontrol formula would subject any incremental production to price controls in the same percentage as if a lesser amount had been produced.

In view of the foregoing considerations, the decontrol rule adopted by FEA today has been modified to measure decontrolled old crude oil by reference to an established base of the recent production level of old oil from the property concerned. This will provide an immediate price incentive to all properties to increase production above that level. Accordingly, the new regulation establishes a "decontrol base production level," which is defined as the

average monthly production of old oil from the property concerned during the three calendar months ending June 30, 1975, based on maximum feasible rates of production in those months. Any old oil production above that level in each month beginning with August, 1975, will be decontrolled, as will an amount of each current month's old oil production which is equal to the decontrol base production level multiplied times a percentage equal to 3.3 percent times the number of months beginning with August, 1975, through that current month, plus one percent (representing the decontrol action for July, 1975). However, for the month of July, 1975, the only production to be decontrolled will be one percent of the decontrol base production level. Since the decontrol calculations are based exclusively on old oil production levels (controlled oil less "new" and "released" oil), this amendment leaves undisturbed and is in addition to the existing regulations which permit "new" and "released" crude oil to be priced at market levels.

For example, a property which had a 1972 base production control level of 2,000 barrels per month (b/m) and a 1975 "decontrol base production level" (i.e., old oil production level) of 1,680 b/m might reach the following hypothetical total production levels: in July, 1975, 1,600 b/m; in August, 1975, 1,640 b/m; in October, 1975, 1,880 b/m; and in January, 1976 2,180 b/m.

Under the amendment adopted by FEA today, the amount of July production of 1,600 barrels which would be decontrolled would be one percent of the decontrolled base production level of 1,680 barrels, or 17 barrels. The amount of August production of 1,640 barrels which would be decontrolled would be 4.3 percent (3.3 percent for August plus one percent for July) of the decontrol base production level of 1,680 barrels, or 72 barrels.

Decontrolled production for October would be the 200 barrels of oil (all of which is old oil) produced in excess

of the decontrol base production level, plus 10.9 percent (3.3 percent times three months plus one percent) of the 1,680-barrel decontrol base production level, a total of 383 barrels.

For January, in order to determine the amount of crude petroleum that could be sold at market levels, the producer would first note that the 180 barrels in excess of the 2,000 barrel base production control level comprised "new" oil, and that, accordingly, 180 barrels of "released" oil would be available (omitting for purposes of this example the cumulative deficiency requirement). This means that the months's production of old oil is 1,820 barrels. The amount of old oil which would then be decontrolled pursuant to this amendment would be the 140 barrels by which the 1,820 barrels of old oil production for the month exceeds the 1,680 barrel decontrol base production level, plus 20.8 percent (3.3 percent times six months plus one percent) of the 1,680-barrel decontrol base production level, or 349 barrels. Thus, for the month, 1,331 barrels would be subject to the old oil ceiling price and a total of 849 barrels would be sold at market levels (although subject to the higher ceiling price for "decontrolled" oil).

The foregoing examples are intended merely to illustrate the computations under current new and released crude oil price rules, and under this amendment, where the current month's production is (1) below the "decontrol base production level," (2) above the "decontrol base production level" but below the 1972 base production control level, and (3) above both the "decontrol base production level" and the 1972 base production control level. (These examples are not intended to reflect projected rates of production for any particular property or for U.S. domestic production generally.)

4. *Decontrolled price ceiling.* Pricing policies recently announced by OPEC indicate that world crude oil price

levels, which have remained generally stable for more than a year, might be increased in the coming months.

In order to avoid the possibility that future world price increases might result in U.S. domestic price increases to levels which are above the current landed cost for imported oil (i.e., the world market plus the $2.00 per barrel supplementary import fee), the FEA has further modified its proposed rule, to establish in this amendment an ultimate price ceiling for decontrolled domestic crude oil of $13.50 per barrel applicable until the end of the 30-month decontrol period. This ceiling will apply to all domestic crude oil other than stripper well crude oil, which is exempt from price controls pursuant to the Emergency Petroleum Allocation Act of 1973. With respect to properties from which new or released crude oil was produced and sold in the month of January, 1975, the ceiling price shall be the highest price charged for crude oil produced and sold from that property in January, 1975, plus $2.00 per barrel; and with respect to decontrolled crude oil produced and sold from all properties which did not produce and sell new or released crude oil in January, 1975, the ceiling price shall be $13.50 per barrel.

The FEA does not intend by imposing this safeguard to alter the fundamental nature or direction of the decontrol program. While the existence of an ultimate price ceiling means in one sense that decontrol is not absolute, the experience under price controls since the Economic Stabilization Act of 1970 indicates that no price exemption can be considered permanent where economic conditions remain unsettled or vulnerable to disruption. The FEA intends under this rule merely to make clear in advance the point above which decontrolled prices will not be permitted to rise without a price freeze and concurrent reassessment of crude oil cost/price and supply/demand forces.

Should Congress adopt a windfall profits tax measure, as urged by FEA, any increased oil-producer revenues

generated due to possible future OPEC price increases would be returned to the Treasury whether or not FEA imposed an ultimate crude oil price ceiling. However, assuming a windfall profits tax is enacted and the authority of the FEA to regulate petroleum prices is extended, it would remain the responsibility of FEA to monitor progress toward import-duction goals and to take such additional steps as might be necessary to assure that domestic production is increased at the rate and in the manner deemed most appropriate. The establishment of an ultimate price ceiling at this time helps to clarify energy policy for both producers and consumers and is in keeping with FEA's continuing responsibility to guide and direct attainment of energy policy goals.

5. *Technical changes.* Technical changes have been made in §§ 211.62 and 212.131 to conform the entitlements program and the crude oil sales certification requirements to the decontrol program.

(Emergency Petroleum Allocation Act of 1973, as amended, Pub. L. 93-159, as amended by Pub. L. 93-511; Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185).

In consideration of the foregoing, Parts 211 and 212 of Chapter II, Title 10 Code of Federal Regulations, are amended as set forth below, effective immediately upon the expiration of the period required pursuant to section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973, as amended, unless this amendment or any portion thereof is disapproved by either house of Congress during that period.

Issued in Washington, D.C., July 14, 1975.

ROBERT E. MONTGOMERY, Jr.,
General Counsel,
Federal Energy Administration.

1. Section 211.62 is amended in the definition of "old oil" to read as follows:

§ 211.62 Definitions.

* * * * *

"Old oil" means old crude petroleum less any related decontrolled old crude petroleum, as each of these terms is defined in § 212.72 of this chapter.

* * * * *

2. Section 212.72 is revised to add, in appropriate alphabetical order, a definition of "decontrol base production level" and "decontrolled old crude petroleum" to read as follows:

§ 212.72 Definitions.

* * * * *

"Decontrol base production level" means the total number of barrels of old crude petroleum produced and sold from the property concerned during the three calendar months ending June 30, 1975, divided by three. The decontrol base production level for each property shall be based upon each well on that property having been maintained at the maximum feasible rate of production during the three calendar months ending June 30, 1975, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. In a case where the property concerned was not so maintained, the FEA may assign a decontrol base production level which fairly represents the production level which would have been attained if that property had been so maintained.

"Decontrolled old crude petroleum" means:

(1) For the month of July, 1975, a number of barrels of old crude petroleum produced and sold from the property concerned in that month equal to 1 percent of the decontrol base production level for that property;

(2) For months subsequent to July, 1975, (a) the total number of barrels of old crude petroleum produced and sold from the property concerned in the current month which exceeds the decontrol base production level for that property, plus (b) a number of barrels of old crude petroleum produced and sold from the property concerned in the current month equal to the product of the decontrol base production level for that property multiplied by a percentage equal to 3.3 percent multiplied by the number of months beginning with August, 1975, through the current month plus one percent.

3. Section 212.74 is revised to read as follows:

§ 212.74 New, released and decontrolled old crude petroleum.

(a) Notwithstanding the provisions of § 212.73(a), but subject to paragraphs (b) and (c) of this section, a producer of crude petroleum may charge any price for the new crude petroleum, the released crude petroleum, and the decontrolled old crude petroleum produced and sold from the property concerned in the month concerned.

(b) Until February 1, 1978, no producer may charge a price for any new crude petroleum, released crude petroleum, or decontrolled old crude petroleum which exceeds the highest price charged for new or released crude petroleum produced and sold from the property concerned in January, 1975, plus $2.00 per barrel, or with respect to such crude petroleum produced from a property from which new or released crude petroleum was not produced and sold in January, 1975, a maximum of $13.50 per barrel.

(c) A producer that charges a price for decontrolled old crude petroleum which exceeds the ceiling price for old crude petroleum shall maintain each well on the property concerned at all times at the maximum feasible rate of production in accordance with recognized conservation practices, and shall use all reasonable means to

insure that production is not significantly curtailed by reason of mechanical failure or other disruption in production.

4. Section 212.131 is revised in paragraphs (a) and (b) to read as follows:

§ 212.131 Certification of domestic crude petroleum sales.

(a) (1) Each producer of domestic crude petroleum shall, with respect to a first sale of domestic crude petroleum, certify in writing to the purchaser: (i) The ceiling price of that domestic old crude petroleum, (ii) the amount of stripper well crude petroleum, (iii) the amount of new crude petroleum, (iv) the amount of released crude petroleum, (v) the amount of decontrolled old crude petroleum, and (vi) the amount of old crude petroleum which has not been decontrolled, provided, that the certification requirements of this paragraph (a) (1) may be complied with by a one-time certification by a producer to the purchaser as to the base production control level crude petroleum for each month of 1972 and as to the decontrol case production level for the particular property. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part.

(2) Each seller of domestic crude petroleum, other than a producer of domestic crude petroleum covered by paragraph (a) (1) of this section shall, with respect to each sale of domestic crude petroleum other than (i) an allocation sale pursuant to § 211.65 of part 211, or (ii) a sale in which no volumes of old oil (as defined in § 211.62) are deemed to have been transferred pursuant to § 211.67(g) of part 211, certify in writing to the purchaser the amount of old crude petroleum which has not been decontrolled included in the volume of domestic crude petroleum so sold. The certification shall also con-

tain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part.

(b) With respect to each allocation sale under § 211.65 of part 211, the seller shall certify in writing to the purchaser the amount of old crude petroleum which has not been decontrolled deemed (under the provisions of § 211.67(f) of part 211) to be included in the volume of crude petroleum so sold. Such written certification shall be made within 25 days following the month in which the crude oil so sold is delivered to or for the account of the purchaser.

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[FR Doc. 75-18656 Filed 7-15-75; 12:08 pm]

Title 10—Energy

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

PART 211—MANDATORY PETROLEUM ALLOCATION REGULATIONS

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Revised Program To Phase-Out Old Oil Price Ceilings

A. *Introduction.* On July 14, 1975, the Federal Energy Administration adopted an amendment to its regulations to provide for the gradual removal of price controls from domestic crude oil. On July 16, 1975, the amendment was submitted to Congress for its review pursuant to section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973, and on July 22, 1975, the House of Representatives adopted a resolution disapproving the amendment. Accordingly, pursuant to section 4(g)(2) of the Act, the amendment adopted July 14, 1975 shall not take effect.

In light of the foregoing, and upon further consideration of the comments and presentations submitted in the rulemaking proceeding that has been held on the proposal to phase-out old oil price ceilings as well as other information available to FEA, the FEA hereby adopts a revised amendment to its regulations to provide for removal of price controls from domestic crude oil in a manner that is even more gradual than the 30-month decontrol program that was initially adopted. This amendment is being submitted to the Congress for its review pursuant to section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973. Unless disapproved by either house of Congress during the five day period allowed for legislative review, the amendment will de-

control "old" crude oil (now subject to a ceiling price averaging $5.25 per barrel) over a 39-month period beginning September 1, 1975, and ending November 30, 1978. Decontrol would be at the rate of 1.5 percent a month for the first 12 months, 2.5 percent a month for the next 12 months, and 3.5 percent a month until decontrol is complete, after another 15 months.

The amendment also provides for a secondary ceiling price for all domestic crude oil (other than stripper well crude oil) to be in effect during the 39-month decontrol period. This ceiling, which is slightly above the uncontrolled domestic price levels prior to the February, 1975, effective date for a $1.00 per barrel supplementary import fee, will help insure that any future sharp increases by OPEC on crude oil prices would not trigger equally higher domestic crude oil prices. It will also serve to further minimize the impact of decontrol on economic recovery.

The ceiling price will average $11.50 per barrel for the month of September, 1975, and will be increased at the rate of $.05 per barrel per month until price controls have been completely phased out at the end of November, 1978. This ceiling price will therefore reach an average of $13.40 per barrel in the last month of this decontrol program, which is approximately the average cost of all uncontrolled crude oil sold in the United States, including the impact of the $2.00 per barrel supplementary import fee.

This proceeding was initiated on April 30, 1975, when the Federal Energy Administration issued a notice of proposed rulemaking and public hearing (40 FR 19219, May 2, 1975) to amend Part 212 of Title 10 of the Code of Federal Regulations to phase out over a 25-month period all price controls on crude oil at the producer level.

Fifty-nine written comments were received in response to the notice of proposed rulemaking before the close of

the period for receipt of such comments. Oral presentations were made by 29 persons at the public hearings held on May 13 and 14, 1975. All these comments and presentations were considered by the FEA, and certain further modifications in the proposed amendments have been made, to arrive at the revised final amendment adopted today, which again reflect FEA's consideration of these comments and presentations as well as other information available to FEA. These modifications included in the decontrol rule now promulgated are discussed in Section E, below.

B. *Background.* The petroleum industry has been subject to various forms of price controls since 1971, a period of about four years. When the general Phase IV price controls ended on April 30, 1974, with the expiration of the Economic Stabilization Act of 1970, the only industry which remained subject to price controls (as administered by the FEO and subsequently the FEA) was the petroleum industry.

The reason for continuing price controls on the petroleum industry was, of course, the serious shortage of crude oil and products derived therefrom in late 1973 and early 1974. In response to this emergency situation, the Emergency Petroleum Allocation Act of 1973 was enacted in November 1973, pursuant to which price controls on the sale of crude oil and derivative products have been retained.

As its name suggests, that Act was chiefly concerned with assuring adequate supplies through regulatory mechanisms by which covered products would be equitably allocated to all regions and to all users throughout the product distribution chain. Price controls were retained to further assure that reduced supplies would not lead to inequitably high prices.

At present, about one-third of total domestic production of crude oil is not subject to the ceiling price of 10

CFR 212.74. This amount represents crude oil which is under the congressionally-mandated stripper well lease exemption and crude oil which is allowed to be priced at market levels under existing production-incentive regulations concerning "new" and "released" crude oil. Taking into account imported crude oil, about 56 percent of all domestically refined crude oil is not subject to price ceilings.

Domestic crude oil subject to price celings, defined as "old" crude petroleum, sells at an average of $5.25 a barrel (or about 12½ cents a gallon), while the average price of uncontrolled domestic crude oil rose from about $11.30 a barrel in January, 1975, prior to the increase in import fees, to a level of about $12.25 (29 cents a gallon) by May of this year.

The Emergency Petroleum Allocation Act of 1973 permits exemptions from allocation and price controls for products subject to the Act to be granted only under certain conditions. An exemption may apply to only one product and may extend for a period of not more than 90 days. Any proposed exemption must be submitted to Congress prior to implementation, together with findings that (1) there is no shortage of the product concerned, (2) the proposed exemption will not have an adverse effect on the supply of any other product, and (3) controls on the product concerned are no longer necessary to carry out the purposes and goals of the Act. Pursuant to § 4 (g) (2) of the Act, the exemption may not be implemented if disapproved by either house of Congress during the period of five sessional days allowed by the Act for legislative review by each house.

Having received written comments and having held public hearings on its old oil deregulation proposal, the FEA has transmitted this revised final decontrol amendment to the Congress together with the findings set forth below. Under the amendment adopted today, old oil will be gradually decontrolled over a 39-month period, begin-

ning September 1, 1975, and ending on November 30, 1978. The FEA plans to issue a notice stating what congressional action, if any, was taken under section 4(g)(2) on this revised amendment.

As explained in the notice of proposed rulemaking issued April 30, 1975, the FEA's "old oil" decontrol program (which implements one phase of the overall energy conservation program put forward by President Ford in his State of the Union Message) would affect only crude oil sales at the producer level. It would not affect the crude oil allocation regulations or the allocation or price regulations for any other product at any level of distribution. The old oil decontrol program would both help curb domestic consumption and spur domestic production, thus furthering the important national goal of reducing dependence on imported crude oil.

Decontrol will ultimately permit all domestic crude oil prices to rise to the current prevailing world price levels, so that the demand-dampening effects which have been felt worldwide would be felt to the full extent in the United States. Under the two-tiered price system now in effect, the price of most domestic oil is held at a level less than half that of current world price levels, so that the impact which the escalation of world market prices has had on demand elsewhere in the world has been considerably cushioned in the United States.

In addition to conserving domestic supplies by reducing demand, decontrol of domestic crude oil prices would stimulate domestic production, or at least greatly reduce the rate of decline in domestic production, displacing some supplies of crude oil that would otherwise have to be imported. Measures to promote maximum domestic production of crude oil—especially new exploration and drilling activity and implementation of secondary and tertiary recovery techniques—are considered essential in order to help assure adequate and dependable energy resources for

the United States until alternative domestic energy resources can be developed over the long term. Furthermore, the FEA has found that the production incentives afforded by the rules permitting "new" and "released" domestic crude oil to be sold at free market prices are of decreasing impact or effectiveness, as production levels, because of natural rates of decline, are generally falling further below 1972 levels, and 1972 levels of production for a property must be exceeded before the new and released price rules can have any effect.

Thus, many producers, especially those whose current production levels are substantially below the 1972 base levels and are further declining under primary recovery techniques, remain unaffected by the incentives presently afforded because those incentives are too remote to outweigh the cost of implementing the substantial secondary or tertiary recovery programs which would be necessary to bring production up to and above the 1972 base levels. Under the FEA decontrol program, when fully implemented, all production, including additional production, would bring the higher prices now available to uncontrolled oil.

The existing incentives to increase production are, for properties that were producing in 1972, only effective for limited periods of time in any event, since the inevitable slackening of output will eventually bring production below 1972 levels, to the point where existing incentives are no longer adequate to encourage investment in secondary/tertiary recovery and other costly programs designed to increase total output of crude oil. Although the additional incentive afforded by the gradual decontrol of old oil would also eventually diminish in effect with respect to existing properties, due to the inevitable decline or exhaustion of worked-over reservoirs, the purpose of decontrol is not to provide a permanent solution to limited domestic production capabilities. Rather, it is intended simply to provide incentives of sufficient effectiveness and duration

as will yield maximum levels of domestic production until such time as supplementary energy resources can be developed. Although existing incentives are believed to have contributed substantially to the current reduction in the rate of decline in domestic production, FEA believes that existing incentives clearly cannot work to maintain domestic production at levels now thought necessary to avoid an unacceptable degree of reliance on imported fuels over the next few years.

As also noted in the April 30, 1975, notice of proposed rulemaking, an additional benefit of decontrol of domestic crude oil will be the elimination of economic distortions caused by the present two-tiered pricing system. The two-tiered pricing system inevitably causes cost disparities among refiners and marketers of petroleum products. Although these cost disparities have been substantially reduced by the crude oil entitlements program, they can never be entirely eliminated while the two-tiered pricing system exists. Such cost disparities significantly hinder FEA's ability to assure that the competitive viability of the independent sector of the petroleum industry is maintained.

Moreover, the existing complicated structure of price controls at all levels of distribution, which is necessitated in large measure by the existence of cost disparities resulting from the two-tiered price system, tends to be self-defeating over the long run by reducing normal incentives toward increased production and cost control, and by eliminating the ability of the industry to engage in long range business planning. As effectiveness of price controls lags over time, regulations of greater complexity and reach become necessary to maintain a controlled-price structure. And tightening of controls, in turn, tends further to stifle initiative and to contribute to greater economic distortions.

C. *Findings. 1. There is no shortage of crude oil.* As FEA representatives have previously testified at con-

gressional hearings, there is currently no shortage of crude oil available to U.S. refiners. Worldwide production capability substantially exceeds current demand. U.S. refiners have been able to obtain from foreign sources all requirements needed to fill the domestic production shortfall. Inputs to U.S. refineries, which dropped markedly during the first three months of 1974, now exceed pre-embargo levels. Domestic crude oil inventories have also increased, and exceed pre-embargo levels.

The level of crude oil production in the OPEC countries continues to decline due to reduced demand. At the end of March, 1975, output was 25.72 million barrels/day (b/d), compared to 28.85 million b/d at the start of 1975, a drop of 11 percent. These production figures represent 66 percent of OPEC's currently estimated producing capacity of 29 million b/d.

U.S. petroleum inventory and import estimates for late April 1975 show an inventory-to-import ratio of approximately 167 days. This is considerably higher than the 123 days of stocks available in April 1974. Petroleum stocks were approximately 852 million barrels at the end of April 1975 and 815 million barrels at the end of April 1974, an increase of 4.5 percent. Imports for the same periods were approximately 5.1 and 6.6 million barrels per day respectively, a decrease of 23 percent.

The general availability of crude oil to meet U.S. demands is also demonstrated by current data concerning the FEA allocation programs. For example, allocation fractions for all major refined products and residual fuel oils are at or close to 1.0, generally indicating that crude oil is in sufficient supply to meet virtually all demand for refined and other products derived from crude oil. While supplies of propane are not always adequate to meet demand in all regions of the U.S., such shortage problems as occur relate principally to the fact that most propane is produced from natural gas rather than crude oil, and there has been a decreasing supply of natural gas.

In addition, activity under the FEA's crude oil allocation program has slackened during recent quarters. The buy-sell program in its current form enables small and independent refiners to obtain crude oil supplies from the major refiners to supplement their own supplies. The fact that more and more small and independent refiners are obtaining their supplemental crude oil supplies through normal market channels further indicates the general availability of crude oil at all levels and in all regions of the U.S.

2. *The proposed exemption will not have an adverse impact on the supply of any other oil or refined petroleum products subject to the Act.* Under today's conditions, 20 months after passage of the Act, national policy requires that dependence on imported crude oil be reduced. This can be done by stimulating domestic crude oil production and by curbing demand for residual oil and refined petroleum products. The proposal to decontrol old oil is an important step toward a greater degree of self-sufficiency in meeting our energy needs.

To the extent that decontrol contributes, as expected, to stimulate domestic crude oil production by encouraging increased exploration and drilling activity and the use of secondary and tertiary recovery techniques, decontrol obviously tends to enhance rather than adversely affect the supply of products derived from crude oil. To the extent that higher prices resulting from decontrol dampen demand, as expected, decontrol will also tend to increase rather than reduce supplies of petroleum products.

Increased production and reduced demand brought by decontrol will not result in any domestic surplus of crude oil. It is expected that the result will be an offsetting decrease in the amount of crude oil or refined product that would otherwise be imported to meet domestic needs. To this extent, decontrol will not change the overall availability of petroleum products in this country. How-

ever, because domestic crude oil is a more reliable source of crude oil for production of petroleum products than is imported crude oil, decontrol will tend to have a beneficial rather than adverse impact on the nature of the domestic supply of petroleum products subject to the Act.

3. *Price controls on crude oil are not necessary to carry out the Act.* All of the purposes and goals of the Act are predicated upon alleviating the emergency conditions resulting from shortages of crude oil, residual fuel oil and refined petroleum products which were being experienced or appeared imminent when the Act was made law late in 1973. As indicated in Finding 1, shortages of crude oil no longer exist. Inasmuch as the underlying condition to which the purposes and goals of the Act generally relate is no longer present, the necessity of price controls on old oil to carry out the Act is no longer apparent.

The express purpose of the Act, as stated in section 2(b), is to grant to and direct the President to exercise "specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." The specific goals to be reached by exercise of the authority granted under the Act, as set forth in section 4(b)(1), may be placed in the following groupings: (a) To protect the general welfare and the national defense; (b) to maintain residential heating, public services and agricultural operations; (c) to preserve an economically sound and competitive petroleum industry; (d) to allocate crude oil in order to permit refineries to operate at full capacity; (e) to provide for equitable distribution of crude oil, residual fuel oil and refined petroleum products at equitable prices among all regions and among all users; (f) to allocate residual fuel oil and refined petroleum products in order to maintain exploration and production or extraction of fuels; and (g) to provide for economic efficiency and minimization of economic distor-

tion, inflexibility and unnecessary interference with market mechanisms.

The decontrol of old oil prices should serve to further the goals indicated in items (c) and (g), above, under present conditions. The economic inefficiencies and distortions brought about by price controls when they are extended over a long period of time are discussed in Section B, above. In addition, the gradual removal of price controls during a period of adequate supply should lead to improvement in the economic position of the petroleum industry and stimulate resumption of normal competitive conditions. These results are particularly desirable in view of the major effort which will be required to alter the trend of declining U.S. crude oil production.

The adequacy of supply under current conditions means that the threat to the national security and welfare posed by an existing or imminent shortage of crude oil no longer exists. Price controls on crude oil are therefore no longer necessary to achieve the short-term goals of the Act concerning protection of the national defense and public welfare (item (a)). For the longer term, removal of price controls should have a favorable effect on the national defense and public welfare. As the Secretary of the Treasury found in connection with the President's Proclamation regarding imposition of import fees, the heavy reliance by the United States on imported crude oil poses a significant threat to the national security. As noted above, the decontrol of oil prices should over the long run significantly reduce reliance on foreign sources of oil.

The goals indicated in items (d) and (f) relate primarily to the allocation program or to petroleum products other than crude oil. These goals are therefore not directly affected by the proposal to decontrol the price of old oil.

The goals in item (b) address the threat to adequate supplies of fuel for residential heating, public services and

agricultural operations resulting from imminent crude oil shortages. This threat was countered primarily by the allocation of crude oil used to produce fuels for these needs, and by the allocation of these fuels themselves. This fact, plus the current absence of any shortage of crude oil, leads to the conclusion that price controls on crude oil are no longer necessary to achieve the goals of the Act relating to maintaining adequate fuel supplies for residential, public service and agricultural needs.

The goal of providing for "equitable distribution of crude oil * * * at equitable prices among all regions and * * * all users" (item (e)) is one which is clearly predicated upon the existence or imminence of a serious crude oil shortage situation. When supplies are short, normal market mechanisms may not assure equitable distribution of supplies across the country and do not prevent price gouging and other shortage-related pricing abuses. In other words, the goal of "equitable prices" should not be isolated and read out of context as mandating permanent price ceilings, even when supplies of crude oil are adequate to permit normal market mechanisms to function. In the absence of shortages of crude oil, therefore, price controls on crude oil are not necessary to carry out the goal of equitable distribution at equitable prices.

In addition, FEA believes that "equitable" prices, within the meaning of section 4(b)(1)(F) of the Act, will be achieved by restoring normal market mechanisms during a period of adequate supply and by eliminating economic distortions caused by the current two-tier pricing system. However, to the extent that a return to normal market mechanisms at this time would bring prices on crude oil to levels which might be viewed in certain sectors of the economy as inequitably high because they result in higher prices on certain petroleum products, this view is outweighted by the need to achieve other objectives of the Act and by other considerations, including the fact that decontrol is being phased in gradu-

ally and the availability of legislative measures to alleviate, through tax relief or rebates, the impact of price increases on consumers and other sectors of the economy.

On the basis of all the foregoing considerations, the FEA concludes that price controls on crude oil are not necessary to carry out the Act.

D. *Comments on Old Oil decontrol proposal.* Comments in opposition to the FEA old oil decontrol proposal generally reflected the following arguments:

1. *The argument that U.S. crude oil price levels should be based on production costs and not reflect arbitrary OPEC pricing decisions.* The FEA decontrol program will ultimately permit old oil prices to rise to the vicinity of current prevailing world market prices, plus the supplementary import fee of $2.00 per barrel. Some commentators who opposed the FEA decontrol program generally felt that the world price was artificial and therefore unnecessarily high, and might go higher, resulting in still higher domestic prices for decontrolled crude oil. In order to provide appropriate incentive toward increased domestic production, it was proposed that the old oil price ceiling be retained but set at some higher intermediate level, such as $7.50, $8.50 or $10.00 a barrel.

While no indisputable conclusions on this matter are possible, it is clear that current world price levels, including the supplementary import fee, do not exceed the point at which further price increases cannot be expected to bring significant returns in terms of increased crude oil production. In the view of FEA, decontrol at prices up to price levels averaging $11.50 per barrel for the month of September, 1975, and gradually increasing at the rate of $.05 per barrel per month in each month thereafter, will effectively stimulate domestic production and over time substantially reduce our dependence on imported oil. The amendment adopted today is therefore responsive to the concern that further OPEC domestic

price increases could result in further domestic price increases above those levels providing the maximum useful production incentives, since it imposes a secondary ceiling on domestic crude oil prices.

It should be remembered in this connection that the great bulk of new domestic production of crude oil will come not from traditional production techniques within the contiguous portions of the continental United States but from more sophisticated and expensive production techniques within this area, or from the continental shelf and remote areas of Alaska. Most offshore production is expected to come from previously untapped areas of the Atlantic and Pacific rather than from the more familiar and tested reaches of the Gulf of Mexico. These considerations all point to the need for new technologies, heavier investment burdens, greater risks and greatly increased costs of production.

In addition, the potential exists for substantial new recoveries from worked-over "onshore" reservoirs provided technology for secondary and tertiary recovery is further developed or existing technology becomes economically feasible as prices rise. While not as costly as recovery from offshore and Alaskan frontiers, recovery utilizing secondary/tertiary recovery techniques is generally substantially more costly than primary recovery.

Unfortunately, the level of incentive needed to induce high-risk exploration and cost estimates for successful development projects vary considerably due to the substantial uncertainties connected with exploration and ultimate recovery from remote and unhospitable regions and considerable doubt as to future rates of inflation. Thus, even if costs could be projected with great precision, necessary incentives for increased production could not be provided by setting prices which merely covered costs. While producers acknowledge that current uncontrolled domestic crude oil price levels provide sufficient

incentive to produce new oil, nevertheless as long as three-fifths to two-thirds of production must be sold at the old oil price ceiling of approximately $5.25 per barrel, cash flow, together with other sources of capital, will not be adequate to generate enough capital to finance exploration and development of new oil, no matter what price it may be expected to bring. This problem is of even greater urgency now that tax reform has removed the depletion allowance as a means of accumulating capital for exploration and development.

In this connection, comment provided by oil producers indicates that while industry profits were high in 1974, profits for the first quarter of 1975 have dropped to an average of about two-thirds of the level of the first quarter of 1974. On an annualized basis, this level of profit would produce a return on stockholder equity of 10.5 percent. For the ten-year period prior to 1974 the rate of return on stockholder equity was 11.4 percent for the petroleum industry compared with 11.6 percent for all manufacturing. These figures tend to support the view that the high profit levels of 1974 were not typical, and were the result of short-term nonrecurring forces. According to industry comments, the steep decline in industry profits this year, while attributable in large degree to the change in the depletion allowance, significantly exceeds the decline attributable to that change.

Management decisions as to capital needs and adequacy of price incentives necessarily rest with producers and, unless control of oil production is to be assumed by the government, oil firms cannot be forced to develop and market additional amounts of crude oil, even if price levels deemed "adequate" by FEA or Congress were to be adopted. Several commentators made reference in this connection to the serious decline in natural gas production that has occurred under long-term federal price regulation.

Taking into account both FEA and industry estimates, adequate incentive for development of new "onshore" crude oil (i.e., enhanced recovery from traditional domestic reservoirs by secondary/tertiary methods) is currently estimated at between $7.00 to $10.00 a barrel; for development of new oil from Alaska and offshore or continental shelf regions, at between $7.00 to $12.00 a barrel; for development of oil from shale, at between $12.00 to $15.00 a barrel; for development of oil from coal, at about $18.00 a barrel. This array of estimates suggests that if imports are to be held at acceptable levels by substituting significant amounts of new domestic production, it will be both necessary and appropriate to allow prices eventually to rise to the vicinity of currently prevailing world market levels.

The foregoing estimates are generally supported by estimates provided to FEA by other sources. For example, industry data submitted by the Society of Petroleum Engineers indicates that the cost of developing and producing a barrel of crude oil in 600 feet of water in the North Atlantic and North Pacific is 3.5 times the cost at the same depth in the Gulf of Mexico, while the cost in the Gulf of Alaska may range up to six times that in the Gulf of Mexico. Lag times are more than twice as great in these frontier areas. In addition, an independent economist testified before a congressional committee that the replacement cost or "economic cost" of domestic crude oil reached a level of $12.73 a barrel in 1974. The high cost of finding "replacement" barrels of crude oil for those we consume today must be financed, in the main, by profits earned on the barrels sold today.

In the opinion of FEA, the task which the nation faces is one of providing sufficient incentives to private industry to develop, to the maximum extent possible and as quickly as possible, additional domestic crude oil resources which wil reduce dependence on unreliable foreign crude oil. Revival of domestic production will require a major

undertaking in frontier regions at high cost. A decision to offer maximum incentives and to pursue maximum efforts to this end is our own decision and not one dictated by foreign pricing policies.

2. *The argument that decontrol would impose too great a burden on the consumer.* Most commenting refiners stated that old oil decontrol would result in an average price increase of 5 cents or 6 cents per gallon of petroleum product. Suggesting that actual dollar cost increases to the consumer would be within manageable limits, Exxon commented that gasoline prices today are below 1950 levels, in terms of constant dollars, and would remain so even if old oil decontrol were effected immediately. Other comments either directed attention to "ripple effects" or noted that the cost was a small price to pay for greater energy independence.

FEA assessment of impact on the consumer of the revised amendment adopted today indicates that the combined effect of the old oil phase out and secondary ceiling prices will be to keep any increases in retail prices due to increased OPEC prices or other causes at one-half to 1 cent less than they would otherwise be by the end of this year under current controls. This fact illustrates that the program to phase out crude oil price controls over a 39-month period, together with secondary price ceilings, will substantially diminish the impact of decontrol on consumers compared with the original 25-month decontrol proposal. FEA estimates that the total retail price increase attributable to decontrol will be approximately 5-6 cents per gallon of petroleum product by November, 1978.

The FEA assessment of impact on the consumer also takes into account the intangible but real benefits which would accrue to the public at large through increased national economic security brought by lessened dependence on unreliable foreign crude oil sources, improved balance

of payments position, revived domestic industrial production and new jobs in the petroleum industry. In addition, the "windfall profits" tax on oil producers' excess revenues proposed by the President would yield tax receipts which would be used to provide direct rebates to energy consumers. These factors mitigate to a significant extent the actual dollar cost to consumers.

On the other hand, the FEA is aware that prices on such products as home heating oil are already very high and that further increases could impair the ability of certain consumers (particularly the aged and the poor) to pay heating bills, despite the gradual nature of the FEA decontrol program and tax relief. Specific legislative proposals, such as a home insulation tax credit, have been proposed to the Congress to minimize the impact that relatively higher energy costs, including costs of home utilities, will ultimately have on various sectors of the economy.

However, the FEA considers the immediate adoption of this gradual crude oil decontrol program of such overriding national importance that no further delay can be justified. FEA believes this action to be consistent with the admonition in the Conference Report on the Emergency Petroleum Allocation Act of 1973 that in exercising authority under that Act it would be necessary to "strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply and of holding down spiraling consumer costs."

3. *The argument that decontrol will not reduce demand.* Several comments were received which stressed that consumers have already "dialed down" and taken all other available conservation steps, and that no further realistic anti-consumption measures are available, particularly to the homeowner. According to this view, the decontrol program would therefore merely squeeze the consumer.

While the FEA acknowledges that many useful conservation measures in home heating (except perhaps major insulation efforts) were instituted last year, nevertheless comments with respect to inelasticity of demand are not borne out by the demand responses experienced with respect to past price increases.

The decontrol program will contribute to the long-term goal of reducing dependence on unreliable foreign crude oil and the benefits of achieving that goal must therefore be measured on a long-term basis. The FEA position that increased prices of domestic crude oil will dampen demand domestically is based on the realistic assumption that higher fuel prices in the long run will inevitably result in or contribute to smaller and/or more efficient automobiles, more efficient home heating systems, increased construction and use of public transportation systems, and more efficient use of fuels in commerce and industry. All of these will contribute to contracting energy demand.

Moreover, means are available for easing short-term problems relating to demand reduction. The President has consistently urged that appropriate legislative action be taken to ease the burden on consumers of the transition to an economic system based on relatively higher costs for energy than have been experienced in the past. The FEA will continue to work actively in seeking to solve transitional consumer problems.

4. *The argument that decontrol of crude oil should not be undertaken unless natural gas prices are deregulated simultaneously.* A number of petroleum marketers stated that they would not support the FEA decontrol program unless natural gas prices were decontrolled at the same time. Understandably, marketers of petroleum fuels are concerned that they will lose a share of their fuel markets to natural gas marketers if petroleum fuels become increasingly non-competitive in price.

To some degree the concern of petroleum marketers in this respect may be exaggerated. The present short supply of natural gas is expected to become more critical in the coming months, so that it is most unlikely that many consumers will be able to substitute natural gas for petroleum fuels even if the latter become more expensive. Only if Congress acts to decontrol natural gas prices substantially in advance of implementation of a program to decontrol crude oil prices could there be an expansion of natural gas supplies sufficient to permit inroads into the petroleum fuels market. In that event, of course, natural gas prices would have begun to climb before those of petroleum fuels, so that the petroleum marketers would be in a relatively better competitive position.

The FEA agrees that many of the same reasons which support decontrol of crude oil prices support decontrol of natural gas price levels. However, regulation of natural gas prices is not within the jurisdication of FEA. In exercising its responsibilities under the Emergency Petroleum Allocation Act of 1973, the FEA must move forward to develop policies and programs within its mandate, while recommending for congressional action complementary measures which are beyond FEA authority to implement.

Congress has under active consideration proposals to deregulate the prices of natural gas. In view of the urgency of taking steps now to alter the trend toward increased imports of crude oil, and in view of the gradual phase-out approach of the FEA decontrol program, the FEA believes it is appropriate to commence gradual decontrol of old oil price ceilings without waiting for final congressional action on natural gas prices.

The FEA recognizes that the Emergency Petroleum Allocation Act of 1973 places special emphasis on protecting the competitive viability and market share of independent marketers, to the maximum extent practicable and consistent with the other objectives of the Act. FEA

will therefore maintain a continuing review of the market shares of home heating oils versus competing fuels to insure that decontrol of crude oil does not have a significant adverse impact on independent marketers.

5. *The argument that decontrol of crude oil should not be undertaken until a "windfall" profits tax is enacted.* For the reasons given under argument number 4, above, the FEA believes that the decontrol program must begin now, without further delay. Action on a "windfall" profits tax can be completed within the next few months by Congress without disrupting an orderly administrative decontrol program. Increases in producer revenues will be gradual under the phased decontrol schedule, and in any event a new profits tax may be imposed retroactively.

6. *The argument that decontrol by FEA would harm the airline industry in contravention of one of the goals of the EPAA.* Representatives of the airline industry commented that U.S. airlines, already in financial difficulty because of the increases in jet fuel prices in 1974 and the effects of the recession on airline travel, would be further adversely affected by another round of fuel price increases brought about by decontrol.

The airline industry takes the position, in effect, that decontrol should not be permitted to proceed because it would impair public air transportation in contravention of one of the goals of the Emergency Petroleum Allocation Act.

The FEA recognizes that one of many express goals to be achieved by the allocation and price regulations promulgated under the Emergency Petroleum Allocation Act of 1973 is to "provide for maintenance of all public services * * * including transportation facilities." However, the concern of Congress in this respect was directed to the adequacy of supplies to keep transportation systems running. This is clearly shown by the following

specific discussion of air transport problems in the Conference Report on the Act.

> The petroleum fuel shortage threatens numerous areas of commerce. The jeopardy from shortage of these fuels impacts most directly on transportation. Without adequate petroleum fuel most United States' domestic and international transportation, with no option to convert to other fuels, potentially would be seriously disrupted. A significant reduction of transportation capability could adversely affect all other areas of commerce and the national economy. Thus, one of the primary objectives of the Act is to assure maintenance of transportation services.

The Act clearly does not require the "maintenance" of price ceilings on certain petroleum products purchased by a particular industry.

Moreover, each of the many goals listed in section 4(b) of that Act is qualified by the proviso that the allocation and price regulations need provide for those goals only "to the maximum extent practicable." In explaining why this qualification was included, the Conference Report stated, "It is fully recognized that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another." The qualification was thus intended, according to the Report, "to give the President administrative flexibility in marshalling short supplies and equitably assigning them to particular needs."

Therefore, even if FEA were to agree with the airline industry's view that decontrol does not fully meet one of the many sometimes conflicting objectives under the Act, this would not overcome the FEA's conclusion as to the overriding need to proceed with this decontrol program—a program designed to reflect the present adequacy of supplies and to begin on a gradual basis to restore the petroleum industry to normal functioning.

The FEA is sensitive to the special problems which face the airline industry and other public service industries due to energy cost increases. The change from a 25 to a 39-month phase-out schedule should serve to reduce the impact of decontrol on industries which are especially dependent on petroleum fuels. The FEA is prepared to discuss with any industry or affected group other ways in which adverse effects under the decontrol program can be minimized.

E. *Rule modification.* 1. *Length of phase-out period.* A great variety of suggestions were received for changing the 25-month period for decontrol proposed by FEA in its notice of proposed rulemaking in this matter. These ranged from requests for immediate decontrol, to decontrol over a 5-10 month period, to decontrol over a 4 or 5-year period. However, many commentators indicated that they would be willing to accept the FEA proposal on this issue as a compromise or second choice.

Those who proposed a longer period for phase-out were chiefly concerned with minimizing or softening the impact on the economy or on consumers, in particular. Those proposing a shorter period stressed either the need to remove the economic distortions and other deleterious effects of controls as soon as possible or the need to achieve a greater degree of national self-sufficiency in crude oil at a more rapid pace.

The FEA must, of course, strike a balance between these opposing considerations or concerns. The FEA initially concluded that a somewhat more gradual decontrol pace at the rate of 3.3 percent a month for 30 months (after decontrol of one percent for the month of July, 1975), represented a reasonable balance on this issue, and the initial amendment submitted to the Congress on July 16, 1975 therefore provided for a 30-month phase-out.

Upon further consideration, a gradual phase-out program is adopted in this revised decontrol amendment

which differs in several significant respects from the 30-month phase-out program. First, the length of the phase-out period has been substantially extended, from 30 months to 39 months. This period is 56 percent longer than the initial 25-month proposal, and 30 percent longer than the 30-month amendment that was submitted to Congress on July 16, 1975. Second, the decontrol program is scheduled to begin effective September 1, 1975, compared with June 1, 1975, under the initial 25-month decontrol program and mid-July under the 30-month decontrol amendment submitted to Congress. Third, the rate of decontrol has been substantially reduced in the first 12 month portion of this longer period, from 3.3 percent each month under the 30-month plan to 1.5 percent each month under the 39-month decontrol program. It has also been reduced in the second 12-month period, from 3.3 percent to 2.5 percent; and in the remaining 15 months of the program, it will be at the rate of 3.5 percent or approximately the same as the 3.3 percent rate that was initially adopted for the entire 30-month decontrol program. These changes will go even further in minimizing the effect of decontrol on the consumer and/or insuring that the decontrol program will not have any appreciable impact on the nation's current economic recovery.

2. *Requirement of maximum feasible rates of production.* Comments were received which expressed concern that the decontrol program, as proposed, might have the unintended result of reducing production temporarily if producers held back on production until the end of the phase-out period, when all crude oil could be sold at uncontrolled price levels.

In view of this possibility, the FEA has decided to adopt generally the same express requirement now applicable by its terms only to the stripper well lease exemption, which requires production to be maintained at maximum feasible rates of production. The FEA believes this

requirement is appropriate to assure that the purpose and intent of the decontrol program are not circumvented. The requirement is also fully consistent with the main purpose of decontrol, which is to maintain and increase current levels of domestic production as rapidly as possible. Any holding back would defeat this purpose and would also defeat the effort to minimize adverse effects on the economy by phasing out controls on a gradual basis.

3. *Decontrol base level.* Under the proposed rule the amount of decontrolled oil would have been calculated as a percentage of the base production control level crude petroleum (i.e., 1972 production) rather than as a percentage of the old oil currently being produced. It was pointed out to FEA that inasmuch as 1972 production levels are generally greater than current production levels, the monthly decontrol volume would be correspondingly larger if the amount of decontrolled oil were to be calculated against a 1972 base. This would mean that the old oil produced from a property would be decontrolled in a period of less than 25 months, to the extent that its current production was at less than 1972 levels. Thus, the overall decontrol program, as proposed, would have extended to the end of that 25-month period and would have affected for the full 25 months (as proposed) those properties which continue to produce at 1972 levels, but would have decontrolled properties producing at less than 1972 levels before the end of that period.

In order to clarify this ambiguity concerning the phase-out schedule and in order to assure a full 39-month phase-out for all properties which continue to be productive, the FEA has concluded that it would be preferable to calculate the amount of decontrolled crude oil on the basis of a recent level of old oil production rather than on the basis of the 1972 base level production.

The FEA has also concluded that, in view of the urgent need for increased domestic production of crude oil, the

modified decontrol amendment should be designed to provide production incentives for all properties, at all levels of production, and to provide a continuing incentive for incremental production.

In view of the foregoing considerations, the decontrol rule adopted by FEA today has been modified to measure decontrolled old crude oil by reference to an established base of the recent production level of old oil from the property concerned, which will then be reduced gradually until it has been entirely phased out at the end of the 39-month program for decontrol. This will provide an immediate and continuing price incentive to all properties to increase production above that level. Accordingly, the new regulation establishes a "decontrol base production level," which is defined as the average monthly production of old oil from the property concerned during the three calendar months ending June 30, 1975, based on maximum feasible rates of production in those months, and an "adjusted decontrol base production level," which is the decontrol base production level, reduced in each month by the appropriate percentage (e.g., at the rate of 1.5 percent per month for the first 12 months). Any old oil production above that adjusted decontrol base production level in each month beginning with September 1975, will be decontrolled. Since the decontrol calculations are based exclusively on old oil production levels (total production, less "new" and "released" oil), this amendment leaves undisturbed and is in addition to the existing regulations which permit "new" and "released" crude oil to be priced at market levels, except that such "new" and "released" crude oil will now be subject to the secondary ceiling price.

Thus, producers that have production in excess of 1972 levels shall first calculate the amounts of "new" and "released' crude oil produced and sold from the property concerned. If the amount of "old" crude oil resulting from that calculation is in excess of the adjusted decon-

trol base production level for that month, the amount of that excess is "decontrolled old crude petroleum." If the amount of "old" crude oil is less than the adjusted decontrol base production level, but there is additional production in excess of the "old" crude oil which constitutes "new" and "released" crude oil, such "new" and "released" control crude oil may continue to be priced at the secondary ceiling price, pursuant to the "new" and "released" crude oil price rules.

In order to insure that monthly fluctuations in production and sale of crude oil do not have anomolous price results, a cumulative deficiency provision has been included in the definition of "decontrolled old crude petroleum," which is analogous to the cumulative deficiency provision in the definition of "new crude petroleum." The cumulative deficiency provision provides that, once "decontrolled old crude petroleum" has been produced and sold from a property, any production at less than the adjusted decontrol base production level in future months must first be made up before further sales of decontrolled old crude petroleum can be made. It should be noted that it is only total current production of crude oil from a property at less than the adjusted decontrol base level which will result in a deficiency—not production of old crude oil at less than that level. This will insure that deficiencies in decontrolled old crude petroleum will not result from production at levels in excess of 1972 levels, which result in reduced amounts of old crude oil through operation of the "new" and "released" crude oil price rules.

4. *Decontrolled price ceiling.* Price policies recently announced by OPEC indicate that world crude oil price levels, which have remained generally stable for more than a year, might be increased in the coming months.

In order to avoid the possibility that sharp increases in future world prices might result in equivalent U.S. domestic price increases, and in order further to cushion

the impact of decontrol on the current economic recovery, the FEA has further modified its proposed rule, to establish in this amendment a secondary price ceiling for decontrolled domestic crude oil averaging $11.50 per barrel during the first month of the 39-month decontrol period, and gradually increasing at the rate of $.05 per barrel per month in each month thereafter. This ceiling will apply to all domestic crude oil other than stripper well crude oil, which is exempt from price controls pursuant to the Emergency Petroleum Allocation Act of 1973.

With respect to properties from which crude oil was produced and sold on May 15, 1973, or prior thereto, the secondary ceiling price shall be in September, 1975, the old oil ceiling price determined pursuant to § 212.73 (b), plus $6.25 per barrel. Since the nationwide average price for old oil subject to the ceiling price rule of § 212.73(b) is currently about $5.25 per barrel, this would result in a nationwide average secondary ceiling price of approximately $11.50 per barrel for new, released and decontrolled crude oil in September 1975. Ceiling prices determined under § 212.73(b) are based on the actual May 15, 1973 postings for crude oil, which reflect price differentials for quality—the principal factors being gravity and sulfur content. Use of May 15, 1973 postings therefore preserves these quality differentials, so that the ceiling price rules do not result generally in purchasers paying the same price for different quality crude oil.

With respect to crude oil produced from properties from which crude oil was not produced or sold on or before May 15, 1973, the secondary ceiling price is specified at $11.50 per barrel for the month of September, 1975, with the proviso that the FEA may, by regulation or order, make appropriate upward and downward adjustments in the secondary ceiling price, but only to reflect the extent to which the sulfur content differs from 1.7 percent and the gravity differs from 34° API. Thus, the

secondary ceiling price can be adjusted by FEA to permit quality differentials also to be reflected in this ceiling price. At the same time, however, the national average price level will be maintained at or very near the specified secondary ceiling price level, and the regulation does not, in any event permit any departure from the prescribed secondary ceiling price level as to 1.7 percent sulfur and 34° API gravity crude oil.

Whichever method is used to ascertain the secondary ceiling price—May 15, 1973 postings or the FEA prescribed secondary ceiling price—that price will be increased at the rate of $.05 per barrel per month in each month after September, 1975.

Should Congress adopt a windfall profits tax measure, as urged by FEA, any increased oil-producer revenues generated due to possible future OPEC price increases would be returned to the Treasury whether or not FEA imposed a secondary crude oil price ceiling. However, assuming a windfall profits tax is enacted and the authority of the FEA to regulate petroleum prices is extended, it would remain the responsibility of FEA to monitor progress toward import-reduction goals and to take such additional steps as might be necessary to assure that domestic production is increased at the rate and in the manner deemed most appropriate. The establishment of a secondary price ceiling at this time helps to clarify energy policy for both producers and consumers and is in keeping with FEA's continuing responsibility to guide and direct attainment of energy policy goals.

5. *Technical changes.* Technical changes have been made in §§ 211.62 and 212.131 to conform the entitlements program and the crude oil sales certification requirements to the decontrol program.

(Emergency Petroleum Allocation Act of 1973, as amended, Pub. L. 93-159, as amended by Pub. L. 93-511;

Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185).

In consideration of the foregoing, Parts 211 and 212 of Chapter II, Title 10 Code of Federal Regulations, are amended as set forth below, effective September 1, 1975, unless this amendment or any portion thereof is disapproved by either house of Congress during the period of five sessional days allowed for legislative review under section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973, as amended.

Issued in Washington, D.C., July 25, 1975.

ROBERT E. MONTGOMERY, Jr.,
General Counsel,
Federal Energy Administration.

Parts 211 and 212 are amended as follows:

1. Section 211.62 is amended in the definition of "old oil" to read as follows:

§ 211.62 Definitions.

* * * *

"Old oil" means old crude petroleum less any related decontrolled old crude petroleum, as each of these terms is defined in § 212.72 of this chapter.

* * * *

2. Section 212.72 is revised to add, in appropriate alphabetical order, definitions of "adjusted decontrol base production level," "decontrol base production level" and "decontrolled old crude petroleum" to read as follows:

§ 212.72 Definitions.

"Adjusted decontrol base production level" means the decontrol base production level, less:

(a) Where the current month is one of the 12 months following August, 1975, 1.5 percent of the decontrol base

production level for that property multiplied by the number of months beginning with September, 1975, through the current month;

(b) where the current month is one of the 12 months following August, 1976, 18 percent of the decontrol base production level for that property plus 2.5 percent of the decontrol base production level for that property multiplied by the number of months beginning with September, 1976, through the current month; and

(c) where the current month is a month following August, 1977, 48 percent of the decontrol base production level for that property plus 3.5 percent of the decontrol base production level for that property multiplied by the number of months beginning with September, 1977, through the current month.

* * * * *

"Decontrol base production level" means the total number of barrels of old crude petroleum produced and sold from the property concerned during the three calendar months ending June 30, 1975, divided by three. The decontrol base production level for each property shall be based upon each well on that property having been maintained at the maximum feasible rate of production during the three calendar months ending June 30, 1975, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. In a case where the property concerned was not so maintained, the FEA may assign a decontrol base production level which fairly represents the production level which would have been attained if that property had been so maintained.

"Decontrolled old crude petroleum" means, with respect to a specific property, the total number of barrels of old crude petroleum produced and sold in the current month in excess of the adjusted decontrol base production level for that month, less the current cumulative deficiency

in adjusted decontrol base production level. The current cumulative deficiency in adjusted decontrol base production level is the total number of barrels by which production and sale of crude petroleum has been less than the adjusted decontrol base production level, for all months in which production and sale of crude petroleum has been less than the adjusted decontrol base production level subsequent to the first month in which decontrolled old crude petroleum was produced and sold, minus the total number of barrels of old crude petroleum produced and sold in each prior month which was in excess of the adjusted decontrol base production level for that month, but which was not classified as decontrolled old crude petroleum because of this requirement to reduce the amount of decontrolled old crude petroleum in each month by the amount of the current cumulative deficiency in adjusted decontrol base production level.

* * * * *

3. Section 212.74 is revised to read as follows:

§ 212.74 New, released and decontrolled old crude petroleum.

(a) Notwithstanding the provisions of § 212.73(a), but subject to paragraphs (b) and (c) of this section, a producer of crude petroleum may charge any price for the new crude petroleum, the released crude petroleum, and the decontrolled old crude petroleum produced and sold from the property concerned in the month concerned.

(b) Until December 1, 1978, no producer may charge a price for any new crude petroleum, released crude petroleum, or decontrolled old crude petroleum which exceeds the secondary ceiling price. For purposes of this paragraph, the secondary ceiling price is: (1) For crude petroleum produced from a property from which crude petroleum was produced and sold on May 15, 1973, or prior thereto, the ceiling price as determined under § 212.73(b) plus $6.25 per barrel plus an amount equal

to $.05 per barrel multiplied by the number of months beginning with October, 1975, through the current month; (2) for crude petroleum produced from a property from which crude petroleum was not produced and sold on May 15, 1973, or prior thereto, $11.50 per barrel for all domestic crude petroleum plus an amount equal to $.05 per barrel multiplied by the number of months beginning with October, 1975, through the current month; provided however, that the FEA may by regulation or order permit appropriate upward adjustments and require appropriate downward adjustments in the secondary ceiling price for crude petroleum having a sulfur content other than 1.7 percent and viscosity other than 34° API to reflect quality differences in actual sulfur content and actual viscosity of the crude petroleum concerned from the 34° API, 1.7 percent sulfur reference crude petroleum.

(c) A producer that charges a price for decontrolled old crude petroleum which exceeds the ceiling price for old crude petroleum shall maintain each well on the property concerned at all times at the maximum feasible rate of production, in accordance with recognized conservation practices, and shall use all reasonable means to insure that production is not significantly curtailed by reason of mechanical failure or other disruption in production.

4. Section 212.131 is revised in paragraphs (a) and (b) to read as follows:

§ 212.131 Certification of domestic crude petroleum sales.

(a) (1) Each producer of domestic crude petroleum shall, with respect to a first sale of domestic crude petroleum, certify in writing to the purchaser: (i) The ceiling price of that domestic old crude petroleum, (ii) the amount of stripper well crude petroleum, (iii) the amount of new crude petroleum, (iv) the amount of re-

leased crude petroleum, (v) the amount of decontrolled old crude petroleum, and (vi) the amount of old crude petroleum which has not been decontrolled, provided, that the certification requirements of this paragraph (a)(1) may be complied with by a one-time certification by a producer to the purchaser as to the base production control level crude petroleum for each month of 1972 and as to the decontrol base production level for the particular property. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part.

(2) Each seller of domestic crude petroleum, other than a producer of domestic crude petroleum covered by paragraph (a)(1) of this section shall, with respect to each sale of domestic crude petroleum other than (i) an allocation sale pursuant to § 211.65 of part 211, or (ii) a sale in which no volumes of old oil (as defined in § 211.62) are deemed to have been transferred pursuant to § 211.67(g) of part 211, certify in writing to the purchaser the amount of old crude petroleum which has not been decontrolled included in the volume of domestic crude petroleum so sold. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part.

(b) With respect to each allocation sale under § 211.65 of part 211, the seller shall certify in writing to the purchaser the amount of old crude petroleum which has not been decontrolled deemed (under the provisions of § 211.67(f) of part 211) to be included in the volume of crude petroleum so sold. Such written certification shall be made within 25 days following the month in which the crude oil so sold is delivered to or for the account of the purchaser.

* * * * *

[FR Doc. 75-19796 Filed 7-25-75; 4:27 pm]

APPENDIX I

MATERIALS FROM THE GERALD R. FORD LIBRARY

[SEAL]

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

March 8, 1975

Office of the Administrator

MEMORANDUM TO THE PRESIDENT

FROM: FRANK ZARB

SUBJECT: My separate meetings with Chairmen Dingell and Ullman regarding enactment of an effective energy legislative program.

Yesterday afternoon and this morning I met with Chairmen Dingell and Ullman, respectively, to discuss action on your energy legislative program.

Both indicated an open desire to work together in formulating a legislative package which will be acceptable to Congress and consistent with your goal of regaining U.S. energy self-sufficiency. They informed me that together they are sharing the responsibilities of reporting out appropriate legislation.

While there are areas of disagreement between your proposal and alternatives presently being reviewed by their respective committees and sub-committees, it appears that their main concern centers around exclusive reliance on market forces to obtain a 2 million barrel per day reduction by 1977. Both stated they felt serious economic disruptions would result if we relied on immediate price

increases to obtain this goal, and that politically Congress would have to reject such a proposal. They did, however, indicate a willingness to support a technique which would allow prices to increase at a less rapid rate, such as gradual decontrol and deregulation over a yet to be determined, extended period of time.

In addition, Chairman Ullman stated that many Members do not understand the significance of or necessity for the goal of a 2 million barrel per day reduction in imports. He emphasized the need for continued educational efforts by your Administration in order that the American public and the Congress will understand the necessity for reductions of this magnitude.

During the course of next week we will increase our efforts and move forward in our discussions with these committees. Our staffs have already begun meeting to provide mutual assistance and to begin serious negotiations.

THE WHITE HOUSE
Washington

LOG NO: CM29
3349
BE4-29
LE
FG377

ACTION MEMORANDUM

Date: June 9, 1976 Time:

FOR ACTION:

Phil Buchen
Jim Cannon
Max Friedersdorf

cc (for information):

Jack Marsh
Brent Scowcroft
Bill Seidman

FROM THE STAFF SECRETARY

DUE: Date: Friday, June 11 Time: 2 P.M.

SUBJECT:

Frank Zarb memo 6/9/76 re Petroleum Marketing Practices Act

ACTION REQUESTED:

——For Necessary Action

——Prepare Agenda and Brief

X For Your Comments

X For Your Recommendations

——Draft Reply

——Draft Remarks

REMARKS:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any question or if you anticipate delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

[SEAL]

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

June 9, 1976

Office of the Administrator

MEMORANDUM FOR THE PRESIDENT

FROM: FRANK G. ZARB

SUBJECT: Petroleum Marketing Practices Act

BACKGROUND

Over the past year, there have been a number of Congressional proposals designed to protect the business interests of retail gasoline dealers. Independent gasoline dealers have called for the enactment of such legislation in order to resolve complaints which fall into two related areas. First, dealers allege that gasoline suppliers are arbitrarily terminating or failing to renew the franchise and lease agreements of their retail outlets. Second, independent dealers contend that a number of major oil companies are converting their franchised dealerships to company-owned outlets, to the detriment of the franchised dealers.

The latest, and most complete, of these Congressional proposals is H. R. 13000, the "Petroleum Marketing Practices Act", introduced by Representative John Dingell (Michigan), Chairman of the House Interstate and Foreign Commerce Subcommittee on Energy and Power. Briefly, this bill would do three things:

Title I establishes very strict requirements as prerequisites for a franchisor electing not to renew a franchise contract. A franchisor would be forced to renew unless:

- the franchisee has breached the terms of his franchise agreement and is so notified; or

- there is notification and mutual agreement in writing to terminate the agreement.

This provision establishes severe legal remedies on behalf of the franchisee on the basis of the franchisor's mere failure to renew a lease or franchise agreement.

Title II would place a two-year moratorium on refiners from increasing the total volume of the gasoline they distribute through outlets they operate above the greater of the 1975 level for that firm or the 1972 average for all refiners.

Title III calls for gasoline octane disclosure requirements including the testing of automotive gasolines and postings on fuel pumps and new cars.

Last year when immediate decontrol was being proposed, the Administration sent up the "Gasoline Dealers' Protection Act of 1975", much more narrowly drawn than H.R. 1300. Our bill is based essentially on "good faith" relationships between the parties involved in a lease or franchise; i.e., the duty of each party to act in a fair and equitable manner toward each other. Although your advisors had doubts about the need for this bill, it was submitted as a way of insuring protection for gasoline dealers after price and allocation controls disappeared, as well as facilitating the removal of controls. As you know, the Congress chose to retain controls.

The Dingell Subcommittee is expected to begin markup of this legislation shortly. Chairman Dingell has made it clear that some form of dealer protection legislation must be enacted before our gasoline decontrol proposal will be accepted by the Congress (although this legislation does not guarantee approval of gasoline decontrol).

With this in mind, we have identified those objectionable provisions and areas of possible substantive compromise in H.R. 13000. The Energy Resources Council has considered this issue, has rejected outright support for the current bill, and presents the following options and agency positions:

OPTIONS

1. Oppose H.R. 13000 in its entirety.

   PROS:

   —The bill is unacceptable in its current form, as Titles I and II intrude directly into the marketplace. Title III is administratively burdensome and not particularly useful.

   —The evidence to date has not revealed any widespread franchise or lease cancellations or nonrenewals. Even should abuses occur in this area, remedies could be sought through the basic contract rights of the parties involved.

   —As currently written, Title I could protect inefficient and unprofitable service station dealers from cancellation of leases.

   CONS:

   —Staunch opposition would damage the chances for gasoline decontrol being approved by the Congress.

   —Opposition to the dealer protection concept could lead to criticism of the Administration for being inconsistent, since it did propose a dealer protection bill, although less restrictive than H.R. 13000.

2. Oppose the bill in its current form and offer an alternative approach that would more closely conform to the earlier Administration bill. The alternative would be offered as a compromise only if key Members are willing to go along with an FEA proposal to decontrol the present price and allocation controls on gasoline.

   - The alternative would delete the most onerous sections of Title I ("Failure to Renew" and "Trial Franchise Period") and substitute a "reasonable business judgment" approach to provide a level of

protection for a franchisee against arbitrary cancellation while permitting flexibility to the franchisor to cancel a poor or marginal arrangement. Criteria for defining a "reasonable business judgment" decision to cancel or not renew a franchise would include items such as withdrawal from a marketing area, unprofitable or marginally profitable operations, significant decline in sales volume, franchisee involvement in fraudulent acts, or external forcing events (rezoning, catastrophic occurrence damaging property, proposed relocation of major highway, etc.).

- Oppose Title II in its entirety because of its negative impact on competition and and its aggressive intrusion into the marketplace.
- Accept Title III, although attempt to improve it technically to remove excessive administrative burdens. Since this is the least significant section of the Bill, it could be a negotiable item to achieve the more important changes needed in Titles I and II.

PROS:

—Dealer protection legislation would improve the chances of obtaining gasoline decontrol.

—A workable bill in this area would provide a new legal remedy for the retail dealer where none exists at the present time.

—Without Administration input, the probability of an unsatisfactory bill being subject to Presidential veto is increased.

CONS:

—Regardless of Administration recommendations, the Committee may report out legislation which would be objectionable.

—Involves accepting some permanent Federal regulatory role in exchange for a possible removal of price and allocation controls.

—Chances of achieving all of the Administration's changes are low and could make our later opposition to the bill more difficult.

AGENCY RECOMMENDATIONS

Option 1: Treasury

Option 2: FEA, Commerce, Interior, OMB, State, ERDA, CEA.

EPA takes no position.

PRESIDENTIAL DECISION

Option 1: _____

Option 2: _____

NSC CORRESPONDENCE PROFILE

DOC MO	DOC DA	RECD MO	RECD DA	RECD HR	LOG NUMBER
6	9	6	9	15	7603349

INITIAL ACTION O: Hormats

SOURCE/CLASS/DISCRIPTION

TO: PRES ____ SCOWCROFT F HYLAND ____ DAVIS ____

FROM: SECSTATE Kissinger; SECDEF ____ DCI ____ STATE EXSEC TARB, F OTHER ____

S/S ____ X REF ____ (UNCLAS) LOU C S TS LOG IN/OUT NO FORN EYES ONLY CODEWORD SENSITIVE NODIS EXDIS

SUBJECT: NSC Comments Requested on Rank Cont 6/9/76 Memo re Petroleum Marketing Practices Act

DISTRIBUTION/INITIAL ACTION ASGMT

INTERNAL ROUTING AND DISTRIBUTION

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CONGRESSIONAL				F if Appropriate	
ECONOMIC	F				
EUR/CANADA/OCEANS					
FAR EAST/PRC					
INTELLIGENCE					
LATIN AMERICA					
MID EAST/NO AFRICA					
NSC PLANNING					
PROGRAM ANALYSIS					
SCIENTIFIC					
SUB SAHR/AFRICA/UN					

ACTION REQUIRED

- MEMO FOR SCOWCROFT ... F
- MEMO FOR PRES ...
- REPLY FOR ____ ...
- APPROPRIATE ACTION ...
- MEMO ____ TO ____ ...
- RECOMMENDATIONS ...
- JOINT MEMO ...
- REFER TO ____ FOR ____ ...
- ANY ACTION NECESSARY? ...
- CONCURRENCE ...
- DUE DATE 6-10

COMMENTS (INCLUDING SPECIAL INSTRUCTIONS): ~~No comment, but~~ agree to State, FEA Option 2

SUBSEQUENT ROUTING/ACTIONS

DATE	FROM	TO	STATUS	SUBSEQUENT ACTION REQUIRED OR TAKEN:	DUE	CY TO
6/10			C	Close Out per Hormats		

NSC/S IF INSTR

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SPECIAL DISPOSITION ____

SPECIAL HANDLING ____ SUSPENSE CY ATTACHED X

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CMTS ____

BEST AVAILABLE COPY

[SEAL]

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

September 9, 1976

Office of The Administrator

MEMORANDUM FOR ELLIOT RICHARDSON
JAMES LYNN
JAMES CANNON
ALAN GREENSPAN
WILLIAM SEIDMAN
BRENT SCOWCROFT

FROM: FRANK G. ZARB
EXECUTIVE DIRECTOR,
ENERGY RESOURCES COUNCIL

SUBJECT: NAPHTHA JET FUEL DECONTROL

The attached memorandum on naphtha jet fuel decontrol is being circulated for your votes prior to submittal to the President. Please phone John Hill (961-6025) with your vote before cob, September 10, 1976.

Thank you.

Attachment

[SEAL]

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

Office of The Administrator

MEMORANDUM FOR THE PRESIDENT

FROM: FRANK G. ZARB

SUBJECT: Deregulation of Naphtha-Based Jet Fuel

BACKGROUND

Pursuant to your direction when you signed the Energy Policy and Conservation Act (EPCA) last December, the Federal Energy Administration (FEA) initiated the process of removing from price and allocation controls as many petroleum products as possible. Since then Congress has approved conversion of price and allocation controls to standby status for petroleum products accounting for 40 percent of the yield from a barrel of crude oil. These include residual fuel oils, middle distillates (heating oils and diesel fuels), lubricants, greases, and a number of intermediate products. The sequence of decontrol has been determined by the supply and demand conditions for products, the requirement to hold public hearings and the necessity to avoid having more than one decontrol proposal at a time before the Congress.

Based on these considerations the next product FEA proposes to submit for exemption is naphtha-based jet fuel. This is military grade jet fuel (JP-4), and accounts for approximately 2% of total U.S. refinery production. The Defense Department consumes 98 percent of such fuel and small refiners account for nearly 40 percent of its total production.

The Department of Defense has objected to submitting the naphtha jet fuel proposal for exemption at this time for reasons outlined in this paper.

FEA has completed its study, held public hearings with full knowledge of DOD's opposition, and made the findings required by the Act: adequate supply exists and minimal price impacts will be experienced in the event of decontrol. FEA proposes to transmit this action to Congress for consideration on September 15, 1976. This is the last day that will allow the required time for congressional consideration prior to adjournment.

The remaining major fuels not yet decontrolled are kerosene-based jet fuel, used primarily by commercial airlines, and gasoline. Studies of these fuels are underway and they are scheduled to be proposed for exemption early in the next session of Congress, or later this year should Congress reconvene after the elections.

DOD POSITION

The proposed unilateral decontrol of military JP-4 jet fuel suffers from the following disadvantages:

- A price disparity will be created between decontrolled military jet fuel and commercial jet fuel which will remain under price control. When, following the Arab boycott a similar disparity occurred, there was a congressional investigation and both DOD and FEA were severely criticized and accused of wasting millions of dollars in excessive jet fuel costs.
- Small refiners, the intended principal beneficiaries of JP-4 decontrol, cannot in fact obtain price benefits until their current contracts expire. A few of those contracts will expire by March 31, 1977, but most (61 percent of the contracts, accounting for 60 percent of total supply) run through September 30, 1977.

- Of six refiners holding JP-4 contracts with clauses that permit termination of renegotiation upon decontrol, only one is small. The others that can gain immediate price relief from decontrol are all large firms (Union, Getty, Cities Service, Sun and Continental). Another large firm (Exxon) stands to gain early benefit from decontrol to a lesser degree. At least part of the contracts held by most large refiners will expire by mid-FY 77.
- There will be unprogrammed DOD FY 77 expenditures of $20 million.

DOD recommends that action to decontrol JP-4 at this time be terminated. JP-4 should be decontrolled at the end of FY 77 when all current contracts will have expired.

FEA POSITION

- FEA's findings and views required by EPCA and supported unanimously in testimony at public hearings held on September 3, 1976, indicate adequate supplies and minimal price impacts resulting from decontrol. Specifically, FEA expects price increases of no more than 1 cent a gallon on the average, with a maximum upper limit of 2 cents per gallon. Since DOD buys 98 percent of all domestic naphtha jet fuel production, FEA believes DOD can maintain an appropriate price relationship between naphtha jet fuel and commercial jet fuel, which will remain under price controls.
- The extent to which large refiners benefit and small refiners do not will be a function of existing contractual relationships between DOD and its suppliers. Thus, any budgetary impact will be minimized. In any event, refiners, both large and small, testified unanimously at the public hearings

in favor of decontrol. Decontrol now will encourage investment in small and independent refineries, even though the benefits for some refiners may be postponed until their existing contracts expire.

- Failing to decontrol naphtha jet fuel despite the findings and public testimony conveys an impression that the government is willing to risk higher prices for other consumers but is not willing itself to face the implications of decontrol. This will weaken our argument for decontrolling kerosene jet fuel and gasoline.
- DOD's recommendation to delay the decontrol of naphtha jet fuel until the end of FY 77 would create uncertainty as to the Administration's intent in decontrol timing. FEA's strategy of sequential decontrol has proven effective to date, at least in part by minimizing the constituencies opposed to any one action. Deferring decontrol of naphtha jet fuel until the end of FY 77 would cause this to be the last of the products to be decontrolled. Thus, direct cost increases would be borne by the airlines and motorists from decontrol of kerosene jet fuel and motor gasoline before the Federal government accepted the cost increase of decontrolling JP-4.

AGENCY COORDINATION

PRESIDENTIAL DECISION

——Send decontrol proposal as scheduled.

——Do not send decontrol proposal at this time.

[SEAL]

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

December 30, 1976

Office of The Administrator

MEMORANDUM FOR THE PRESIDENT

FROM: FRANK G. ZARB
Administrator

SUBJECT: Gasoline Decontrol

Background

In accordance with the provisions of the Energy Policy and Conservation Act (EPCA), the Federal Energy Administration has proposed and the Congress has allowed price and allocation controls to be removed from residual fuel oil, middle distillates, military jet fuel, and naphtha, gas oils, and other products. Thus, about half of refiners' output in the United States has been decontrolled, with gasoline, natural gas liquids, commercial jet fuel, and aviation gasoline being the most important products still controlled. Each of these remaining products under control is being considered and analyzed separately with respect to economic and market structure impact.

FEA has now completed the required findings on the effects of decontrolling motor gasoline from both price and allocation controls. These findings have already been the subject of public comment and public hearings throughout the country. The results indicate that motor gasoline can be decontrolled without any price increases in addition to those that would normally occur under controls. In addition, with decontrol of motor gasoline, about 95 percent of U.S. refiners' output would be decontrolled.

Therefore, it is FEA's finding that there exists sufficient justification on economic grounds for your submitting a formal gasoline decontrol proposal to the Congress immediately upon its return, should you choose to do so. Because Congress has only fifteen days to disapprove such a proposal, it must be submitted by January 4, 1977, to become effective during your Administration.

While the decontrol of motor gasoline can be justified on economic grounds, the political implications should be considered. Five Senators-elect wrote to you on December 9, 1976, recommending that you do not submit such a proposal. In addition, Representatives Dingell, Moss and Staggers have communicated their desire to me that no such proposal be submitted during early January as such an important decision should be reviewed first by the new Administration. Furthermore, Representative Dingell, in his capacity as Chairman of the House Interstate and Foreign Commerce Subcommittee on Energy and Power, made it clear during testimony this past year that he would oppose any gasoline decontrol proposal until some form of dealer protection legislation is enacted.

The latest Congressional proposal on this subject was H. R. 13000, the "Petroleum Marketing Practices Act," which was introduced by Representative Dingell and considered by his Subcommittee, but mark-up did not occur before adjournment.

Representative Dingell will probably re-introduce dealer protection legislation early in the next Congress, but it will not be enacted by the time the 15-day review period is up should you submit a gasoline decontrol proposal on January 4. This will be used as an argument against approval of decontrol.

Finally, in any testimony regarding gasoline decontrol during the 15-day review period, we will be questioned as to FEA's ability to assure that dislocation in the marketplace will not occur as a result of decontrol. We in-

tend to propose such protective measures as the operation of a price monitoring trigger and administrative mechanisms for protecting independent marketers during the transition to a decontrolled market for up to one year. In addition, we intend to support quick enactment of appropriate dealer protection legislation to meet Congressional concerns.

We propose to make decontrol effective March 1, which would allow the incoming Administration adequate time to evaluate and perhaps retain controls in effect if they so choose.

Options

Four options are open to you with regard to the submission of any gasoline decontrol proposal.

Option 1

Transmit the gasoline decontrol proposal to the Congress on January 4, 1977, without prior consultation with members of the new Administration.

Pros:

- Fulfills your commitment to phase out government controls whenever they are found to have become unnecessary.
- Clearly illustrates the sincerity and commitment of your Administration in decontrolling gasoline, while specifically addressing Congressional concerns regarding unwarranted price increases and dealer protection.
- Avoids the delays which would ensue while the incoming Administration restudies the issue.

Cons:

- May be disapproved by Congress as a first reaction, since they will be in the formative stages of

getting organized and may not be able to give the proposal the attention it requires.

- Congress may reject the proposal on the basis that it was not made in consultation with the incoming Administration, rather than on the merits of the issue.
- Our perceived inability to deliver on the proposed protective measures will be used as another argument that the proposal should be left for consideration by the new Administration.

Option 2

Transmit gasoline decontrol proposal January 17, which would extend Congressional consideration into the new Administration.

Pros:

- Fulfills your commitment to phase out unnecessary gasoline decontrols.
- Forces immediate attention by the new Administration on this important issue.
- Counters arguments that the new Administration is not involved in this important proposal.

Cons:

- Any credit for obtaining gasoline decontrol would be shared with the incoming Administration.
- As incoming Administration would have only ten days to act, it may decide not to meet the issue on its merits and simply withdraw the proposal or recommend disapproval.

Option 3

Transmit the gasoline decontrol proposal to the Congress on January 4, 1977, after consultation with the new Administration and obtaining their concurrence.

Pros:

- If joint sponsorship can be obtained and this fact communicated to the Congress, the likelihood of passage of the proposal is greatly increased.
- Such a move would help to de-politicize the issue, allowing for more consideration on the merits of the proposal.

Cons:

- Any credit for attaining gasoline decontrol would be shared with the incoming Administration.
- Even with joint sponsorship, Congressional review would have to occur while the new Congress is getting organized.
- It may not be possible to obtain the concurrence of the new Administration.

Option 4

Do not submit the proposal in January, but provide all findings to the new Administration for appropriate action.

Pros:

- Avoids forcing the new Congress to consider the proposal during its own organization period, and during the Executive transition period.
- May minimize potential adverse reaction by the Democratic Congress if and when the proposal is ultimately submitted by a Democratic Administration.

Cons:

- Does not fulfill your commitment to phase out product controls on a timely basis.

- Allows an important ingredient of your energy program to be handled by the new Administration.
- May delay potential submission of a gasoline decontrol initiative, even though the facts support its submission now.

Agency Coordination

	Option #1	Option #2	Option #3	Option #4
Assistant to the President for Legislative Affairs	x			
Domestic Council	x			
Office of Management and Budget	x			
Council of Economic Advisors	x			
Department of Commerce			x	
Department of State	x			
* Environmental Protection Agency		x		
Federal Energy Administration				

* Midlevel staff decision

PRESIDENTIAL DECISION

Option 1 _____

Option 2 _____

Option 3 _____

Option 4 _____

MEMORANDUM OF INFORMATION FOR THE FILE

EXECUTIVE

DATE 5/1/75

FG 31-1
PR 5-2
UT
SP 5/FG 36

LETTER, MEMO, ETC.

TO: THE PRESIDENT

FROM: MAX FRIEDERSDORF

SUBJECT: Majority Leader Mike Mansfield

CORRESPONDENCE FILED CENTRAL FILES—
CONFIDENTIAL FILE

SPECIAL FILES

THE WHITE HOUSE
Washington

May 1, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: MAX FRIEDERSDORF

SUBJECT: *Majority Leader Mike Mansfield*

The attached material contains information which Mike Mansfield wanted you to have.

THE WHITE HOUSE
Washington

April 30, 1975

MEMORANDUM FOR: MAX FRIEDERSDORF

FROM: WILLIAM KENDALL

SUBJECT: *A request from Senator Mansfield*

Senator Mansfield gave his attached statement to the Policy Committee and asked me to make it clear to the President that he had not released to the press the President's letter which I delivered to the Senator last week. He also wanted the President to know that he did not "warn" the President on the oil price rise. As a matter of fact he told me he thought the President had been quite reasonable in the whole matter of energy policy.

[Handwritten notes: "Bill—Please refer to the President. M.M."

"Note N.Y. Times story. I did *not* warn President nor did I release the President's letter to me. I just want to keep the record clear. Mike Mansfield"]

STATEMENT OF SENATOR MANSFIELD
TO
DEMOCRATIC POLICY COMMITTEE

APRIL 28, 1975

Gentlemen,

I wish to welcome Mr. Frank Zarb, Federal Energy Administrator, to our Policy Committee meeting. This meeting is the result of an exchange of letters with the President on energy policy.

On April 18th, I reported to the President on the status of negotiations since March 4th between the Senate Leadership, represented by Senator Pastore, and the Administration, represented by the President's designee, Mr. Zarb. Our report to the President was discussed at the last meeting of the Policy Committee. We strongly recommended to the President that both branches seek to continue to find areas of agreement in energy policy through consultation and negotiation.

The unilateral action of an Executive order for decontrol of oil prices and higher tariffs on imports would impose an energy program and approach on the Nation to which the Congress had not assented. It was the judgment of the Senate Majority Conference—unanimously expressed on February 27—to reject such unilateral action. If such action is taken unilaterally and without any participation by the Congress, it is my own personal judgment that further negotiations between the Congress and the Administration will be all but impossible.

Both the Congress and the President have a responsibility for determining the broad policy for the Nation; certainly energy matters must be included in this con-

text since those presently contemplated would affect substantially the lives of every American for generations. It is inconceivable that the elected representatives of the people would be precluded a voice in charting broad policy guidelines on an issue of such surpassing significance.

I have now received a response from the President dated April 25th. He agrees that there are substantial areas of conceptual agreement but raises a number of matters yet to be resolved. These include the substance of a short-term crash program, short-term conservation and environmental standards over the short-term, and the price of old oil and old natural gas over the next few years.

A copy of the President's letter is before you.

In connection with this response, the President has requested Mr. Zarb to communicate directly with us. Accordingly, I have convened this meeting of the Policy Committee to enable Mr. Zarb to express his views directly to those of you who have been working so diligently over the past several months on these matters. It is still our hope that we might identify those objectives on which we agree and thereby permit the orderly process to take its course with regard to the implementation of these broad areas of agreement between the Executive and the Legislative Branches. To stress the positive at this particular time in our national life will not only produce greater harmony, but might even reduce the gap in those areas of present disagreement over energy policy matters. Challenge and confrontation, on the other hand, would serve no purpose whatsoever.

Viewing the present status of the matter as reached by Senator Pastore and Mr. Zarb, it appears that there is substantial agreement of objective with regard to long-term programs involving strong energy conservation efforts and those relating to augmented and more diverse sources of domestic supply. Notable, too, is the apparent harmony between us regarding emergency authorities

that may be triggered in the event of shortfalls, embargoes or whatever else may jeopardize the available supply of fuel. The significant area of disagreement—as is evident from the President's letter of April 25th—is in the short-term crash program.

Since we do agree substantially on the long-term matters, the question is: what short-term remedies are in order pending the realization of longterm objectives in terms of energy saved through conservation and of new sources of energy produced domestically? It is the President's view that there must be a steep, across-the-board increase in the price of all oil and gas—in effect a doubling of present prices—in order to discourage and prevent, in many cases, the consumption of energy. It has been the view of Senator Pastore, the Ad Hoc Committee and the members of the Democratic Caucus that such a total decontrol of price would have but a negative impact upon an economy still deteriorating. In short, it would price energy out of the marketplace for those least able to afford it. Our basic assumption has been that energy —heating oil or gas or whatever—is not a luxury but an essential ingredient of American life indispensable especially if we are to recover as a Nation, *economically* speaking.

The manipulation of price to reduce consumption by putting energy beyond the reach of the poor is not a satisfactory policy. Detected, however, in the urgency of the Administration to obtain an immediate reduction in oil imports, is a strong foreign policy consideration. To reduce our dependency on OPEC is desirable, but the receding American economy—brought on to a great extent by the precipitous increase in the price of OPEC oil in late 1973—has already reduced dramatically the imports of oil to this country. In fact, the Nation's balance of trade surplus was in excess of $1.4 billion last month due in large part to reduced oil imports. So let us focus on the long-term program—agreeing to objectives—and

let us get down to the business of constructing a rational and sensible energy policy through negotiation and in the framework of the orderly legislative process.

To do otherwise might mean to sacrifice a farreaching energy policy for the Nation that is based on substantial agreement between the branches.

I would hope, therefore, that the discussion today would focus on the long-range measures. I would hope that the short-term problems would be permitted to be resolved by negotiation. They will not be resolved by confrontation.

For Immediate Release July 25, 1975

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

PRESS CONFERENCE
OF
FRANK ZARB
ADMINISTRATOR OF THE
FEDERAL ENERGY ADMINISTRATION
AND
ALAN GREENSPAN
DIRECTOR OF THE
COUNCIL OF ECONOMIC ADVISERS

THE BRIEFING ROOM

10:30 A.M. EDT

MR. NESSEN: Frank and Alan have to go to the Hill and be there by 11:00, so let's start and go for 20 minutes. As soon as this is over, I will have the captive nations' statement for you for automatic release at 11:00.

Q Could you start by going over the new price projection you just gave several people?

MR. ZARB: With your permission, as is not normally my custom, I will make a brief statement and then I will do that.

The President will today send forward a modified decontrol program to the Congress, under our current statute, which will have it before the Congress for five days and simple one-House majority can defeat it. The program continues to provide the principles that the President articulated—conservation of the short-term, leading to independence and fairness and equity to people, the

three major principles we have stuck with since January. It does have an effect of stretching out some of the conservation elements we had counted on one additional year.

The program from a substantive and programmatic standpoint seems to us to answer all of the objections raised by some of the critics in the oil decontrol question over the last two weeks.

They raised the question of effects on the economy during a recovery period. They raise the question of price increases while acknowledging they must occur, should occur, over a gradual period so both the individual consumer and the industrial consumer could readily adjust to it. They raise the objection that the returns to the producers should be moderated to preclude windfall as we provide a sufficient revenue for full productivity.

Now on the other side, the industry and the energy requirements that we must at some point end the Federal control system, this answers that in that it ends in 39 months; secondly, that the industrial community, be it independent or not, should have sufficient return on invested capital to fund our maximum capacity as a Nation.

These provisions in this program answer all those programmatic and substantive issues. It provides as follows:

Old oil will decontrol over a 39-month period. During the first year of operation it will go at a rate of 1-½ percent per month, second year 2-½ percent per month, third year 3-½ percent a month, until it actually finishes in 39 months out and as complete controls expire.

It provides for a ceiling on released oil of $11.50, which, as you recall, was the number we originally calculated as the return to the producer in our 30-month program.

It then has that $11.50 ceiling escalate up at the rate of a 5-cent per month, which brings us to about $13.45 in 39 months and thereby provides the gradualism both with respect to this period of recovery and with respect to the total stretch-out to accommodate adjustments that the consumers require.

We have talked to Chairman Ullman and Chairman Long about a windfall tax program. We are prepared to support a windfall tax program associated with this that would tax the increases of revenues brought on by the released old oil. That would provide an acceptable plow-back that all could agree to, and at the same time it would phase out over a period of three to six years, whatever the two committees finally agreed to.

We spent considerable time in the last week, not only talking about the substantive issues of decontrol and those who would object and why, and where there seem to be reasons that fit into our energy needs and accommodated them, but also the whole notion of windfall and how we could go forward on that track.

In summary, what I am saying is of all the arguments I have heard that were substantive, in the last two weeks, this program appears to answer each and every one of them.

Q Frank, do you have confidence that there is consensus now in the Congress of this program?

MR. ZARB: Peter, I just don't know. I do know that the many, many Democrats who worked with us over the weekend and the early part of this week, until, very often, late in the night, including people such as John Dingell and Al Ullman and many of the people who have been involved, like Jim Wright and Congressman Worth, that during our discussions we raised all of the parameters of problem and solution and this faces squarely those particular issues.

Whether that represents a sufficient consensus to have this thing effected, I am not sure. I do say this is our chance, I think, to demonstrate to the American people that in this business of energy their President and their Congressmen come together and effect an orderly and acceptable solution.

Q Could I follow that by asking whether they, the Congressional Democrats, proposed some features of this?

MR. ZARB: Yes.

Q What about the $2 import fee, does that stay on?

MR. ZARB: That stays on.

Q Can you give us the new examples of gasoline price increases?

MR. ZARB: It is shown in your fact sheet, but I want to caution you a little bit. In 1975 we show a real reduction of about a half-penny a gallon because of the lowering of the cap and the slow start-up of decontrol.

Now, I don't believe, knowing the marketplace, that that will have the effect of actually lowering the pump price by half a penny or a penny. It will have an impact of stabilizing any increases in that magnitude that might have come this year.

The other increases are shown to be a 2-cent increase solely related to these provisions. There are other factors that occur in the marketplace that increase that rise, but solely related to decontrol getting up to the 5 to 6-cent level at the end of the period, solely related to this program.

Q What would happen if Congress approved this program, or let it stand, and then did not extend the August 31 date? Would that cause you a problem?

MR. ZARB: There is no likelihood of that. The Congress would like us to extend the August 31 date no

matter what we did. If the law expired August 31 there would be no controls at all so that would be completely mooted.

Q Why does he want just a 90-day?

MR. ZARB: The discussions we have had thus far would provide if the Congress accepted this—and I emphasize this point—under the law Congress gets a new look every 90 days and has a 5-day period with simple one-House majority to cancel it, so that they have got an insurance policy in terms of being able to re-examine it.

If the Congress does agree to this, they will most likely move to put it in legislative form along with the windfall provisions. If they do that we will have a 39-month extension of the Act or a 36-month extension at that point; thereby all the provisions would happen in parallel and some of them would expire in parallel.

Q Can you be specific about the windfall section? When you talk about appropriate plowback factors, are you talking about what you proposed before or do you have some new dimensions?

MR. ZARB: The discussions we have had thus far have been pretty much around the Senate Finance Committee model that they have been working on. And it has a—and I am going to be general here because it has not been firmed up—but it has the first year the tax gets to about an 80 or 85 percent level. In other words, 15 or 20 percent remains, and then plowback is somewhere between 20 and 25 percent of that 80 or 85 percent.

Now I just want to caution you those were very preliminary numbers to generally discuss principles about return to the industry—what is required to ensure maximum productive use of our resources. I don't want that to be reported as the plan that we have agreed to but you can get a feeling for the general areas which we are discussing.

Now, over the period of four to five or six years, or whatever, that would phase out of existence, so you could see the plowback would become greater perhaps or the 85 percent would go to 80 percent or 60 percent from there on out.

Q On this same point, were you saying a minute ago that the Administration proposes to apply the windfall profits tax only on revenue, additional revenue, on old oil as that price increases, and not at all on $11.50 oil that is at $11.50 now?

MR. ZARB: That is correct.

Q That is a much more generous proposal than the one the Administration made last winter, is it not?

MR. ZARB: Only to the extent it recognizes a change for depletion. You may recall when we presented that in January we were closer in saying this had been calculated on the basis of existing depletion, that the depletion probably makes the difference, and if you look at the real numbers, they come close.

Q Is this the last chance, if Congress does not buy this plan? Do we get instant decontrol on September 1 or does the President sign some shorter extension of the act?

MR. ZARB: It is my best judgment, based upon everything I know as of this morning, that if the Congress turns this down on whatever basis, that the next probable event is full decontrol as of September 1.

Q How would the money be rebated, the taxes that you raise. How much would it amount to?

MR. ZARB: We have talked to a number of people, including Senate Finance, about this issue, since they now have the House passed bill. We would hope they would get the windfall plus rebate mechanism into this bill.

The basis upon which we start talking is that the available funds, which would include the tariff and ongoing windfall, would be a lot lesser than we were talking about in January.

But, our matrix at that point was to return two-thirds of that money to individuals through the income tax mechanism.

The remaining one-third would be divided in half with half going to State, local and Federal Government, and half going to lowering corporate rates.

It is likely because we have a much lesser collection here—at least at the moment we have not faced the natural gas question in this bill—that will be a whole other issue, but that was part of our original calculations, that the Congress might want to readjust the formula in that regard.

We are prepared to have those discussions as soon as they are ready, but that is the program which we put on the table, and it still rests on the table.

Q Would this rebate replace or negate any need for extension of the current tax cut? Maybe Mr. Greenspan could answer that.

MR. GREENSPAN: Those are two wholly independent issues; that is, the question of the extension of the 1975 tax cut is in no way related to this particular question because, as Frank has pointed out, the President's energy program has always contemplated a return, a restoration of the purchasing power of consumers that would be attendant on increases in oil prices.

In that sense, it is sort of an independent program and a far more broader fiscal policy question will be relevant to the 1975 tax cut extension and will not relate to this issue.

Q Frank, just to be sure I am correct on this, are you suggesting the President will still veto a three-month extension if Congress does not go for this next week?

MR. ZARB: I am not in a position to commit the President. I can only give you my best personal estimate of what will occur in this event. He has said time and time again that he has no intention of simply delaying action for the sake of delay.

There seems to be no calculable reason why we should postpone something for three months when we are not begging to know anything more than we know today. It will only bring us back today three months from now, and in my view that would not be an acceptable solution from the President's standpoint.

We need to face these issues in energy, and every one of them is going to be tough, as everyone has been tough up until now, and postponing them is not a solution. It only makes us more vulnerable over a longer period of time before we finally face up on the hard questions that have to be answered, and this is one of the hardest.

Q I want to be sure on the rebates, Frank. Are you saying you believe it is the mood of the Congress to rebate a higher portion of windfall profits to the consumer?

MR. ZARB: No, I am saying that the President proposed in January that all of the captured monies from this program be returned to the consumer. For the first time, we are getting legislative attention to that issue, and we stay in the same position that we anticipate the energy program standing on its own and all the revenues that accrue to the Treasury by virtue of this energy package be returned to the economy, with a giant share to the consumer, including the tariff.

Q Not to quibble over a penny, but Secretary Simon told a group of reporters this morning he expected this plan would raise gasoline prices by 7 cents a gallon at the end of the period. Is that roughly correct?

MR. ZARB: Peter, he could be correct, give or take some mills. I have given that 7 cent number. The real analytical work shows 5 to 6 cents, and the difference being our early calculations based upon a known $13.50 cap.

That 7 cent number has been washed into these last two iterations, and I have continued to try to stay conservative so when we talk about 5 or 6, I am not going to discount 7.

I think it is unlikely, but we have always moved to the higher end of the range because other people do studies and calculate numbers differently and sometimes they try to demonstrate they are higher than they are.

Q He also said there would be a penny increase this year and 4 cents next year. Is that roughly correct, in your calculations?

MR. ZARB: No, we are talking about the effects of this particular program.

Q He did not talk about the program, but he said the compromise would involve these increases.

MR. ZARB: Not being there to ask how the question was asked, we have said right along there are as you know, in the present industry, these cost banks that stay there because of controls that build up, and we had always anticipated from June until Labor Day there could be a 2 to 5 cent increase.

The effects of this program have the effect of a real reduction of a half a penny or so by the end of the year. I don't believe the market mechanism is going to show that on the pump, but it will have a stabilizing effect on prices and probably will preclude any meaningful increases of this variety or at least up to this amount during that period.

I am not trying to be cagey, but the market works with lots of different forces on it and I can only tell you the effects of this program.

Q Will you resist in the legislation after the 90-day extension, the 90-day review clause that is in the present law?

MR. ZARB: I would hope to give the industry some stability—and I am not laying out a new rule at this point—but it has been my understanding right along once we came to agreement with Congress on a plan we both felt would work, one of the things we both wanted to achieve was to give the Nation some feeling of permanence as to how the energy program was going to work.

Under the circumstances, this program has been so designed so that during this first year of recovery the impacts are modified to give comfort to those who felt they had other concerns.

We did not agree with some of that, but the fact was we really did believe that it was worth a last chance to demonstrate that we can get together and push the energy program forward. And I cannot find anywhere in any of the discussions, including much testimony that Alan and I had in the last two weeks, where substantive issues were raised with this, that this program does not answer them.

There may be other issues but——

Q Mr. Zarb, how close does this program get you to your 1977 goals compared to where you wanted to be last January?

MR. ZARB: It slips a portion of that for about a year—but I want to be fair on that question as well.

There are two things that occurred. The recession, which was unanticipated, gives us a little different projection as to increases in imports in the next two years, if we did nothing, so rather than being at the two million

barrel level we are a little closer to the 1.6 million—1.7 million level.

Secondly, we have been able to make some inroads, I think, and will, the way things are structured now and improving what we projected to be our nuclear power capacity unless some things go the wrong way in that area.

There are a few other things that are happening that we can count on for additional improvement, so while we laid the numbers out for you to show you how much we do slip from 1977 to 1978, so that you can see we can be consistent and honest from press conference to press conference, I believe we are going to make up some of that deficit with some other actions we had not counted on.

Q Frank, I am sorry but I don't understand. Why is the windfall profit going to be allowed in the future where it is not allowed now? In other words, why is the windfall profits tax going to phase out? You are still pumping old oil. It is still a windfall profit. You are just going to allow it?

MR. ZARB: No matter what you do your costs go up, and any existing facility, even if your investment was at a lower rate.

The macro effects of this program are to (a) ultimately come out from under controls so the marketplace within general constraints could apply—and by 39 months from now hopefully that will be so; secondly, to ensure that a productive industry is allowed sufficient cash flow within the control mechanism to maximize its productive capacity.

At the same time, it precludes the ability to capture some of these profits unless the profitability goes back into American energy sources in American grounds. So you are able to catch it on both sides.

I think that in my discussions with both Chairmen that there is no question but what legislation of that variety can be written and can be passed, so it does work exactly the way we all want it to work.

THE PRESS: Thank you very much.

END

(AT 10:55 A.M. EDT)

APPENDIX J

Petitioners' Parent Companies, Subsidiaries and Affiliates (Except Wholly Owned) Pursuant to Supreme Court Rule 28.1

AMINOIL INC.
(Formerly Aminoil USA, Inc.)

Aminoil Inc. (formerly Aminoil USA, Inc.) is a wholly owned subsidiary of R. J. Reynolds Industries, Inc.

The subsidiaries and affiliates (not wholly owned) of Aminoil Inc. are:

Long Beach Oil Development
Solar Gas, Inc.

ANADARKO PRODUCTION COMPANY

Anadarko Production Company is a wholly owned subsidiary of Panhandle Eastern Corporation.

The subsidiaries and affiliates (except wholly owned) of Anadarko Production Company are:

Alaskan Northwest Natural Gas Transportation Company
Anadarko Petroleum of Canada Ltd.
Archon International Company
Archon Company Limited
Aurora Industries, Inc.
Bison Insurance Company, Ltd.
Calidad Insurance, Ltd.
D F Service Company, Inc.
Dixene Corporation
Dixilyn-Field Drilling Company
Dixilyn-Field Drilling Ltd.
Dixilyn-Field Drilling Services (U.K.) Limited
Dixilyn-Field Drilling Venture

Dixilyn-Field International Drilling Company, S.A.
Dixilyn-Field Rocky Mountain Drilling Company
Dixilyn-Field-Swire Drilling Company
Dixilyn (International) A.G.
Dixilyn-Field (Nigeria) Limited
Dixilyn-Field 87, Inc.
Dixilyn-Field N.V.
Energy Pipeline International Company
Faskure Technology, Inc.
Illinois Napgas Company
Lachmar
Mantaray Pipeline Company
Matagorda Island Development Corporation
Matagorda Island Exploration Corporation
National Distillers and Chemical Corporation
National Helium Corporation
Norden Limited Partnership
North Antelope Coal Company
Northern Border Pipeline Company
Northern Border Pipeline Corporation
Pan Alaskan Gas Company
Pan Border Gas Company
Pan Eastern Coal Company
Pan Gas Storage Company
PanMark Gas Company
Panhandle Canadian Gas, Limited
Panhandle Eastern Pipe Line Company
Panhandle Trading Company
Pelmar Company
Ravencliffs Development Company
Southwest Gas Storage Company
Southwest Gas Storage Corporation
Stingray Pipeline Company
The Youghiogheny and Ohio Coal Company
Trunkline Gas Company
Trunkline LNG Company
Trunkline Offshore Company
WyCoalGas, Inc.
Y & O Sales, Inc.

ATLANTIC RICHFIELD COMPANY

The subsidiaries and affiliates (except wholly owned) of Atlantic Richfield Company are:

Almeg Extrusion Company, Inc.
Alpart Farms (Jamaica), Ltd.
Alyeska Pipeline Service Company
Anaconda Exploration New Zealand Limited
Anaflex, S.A. De C.V.
ARCO Australia Coal Pty. Ltd.
Arcobrasil Participacoes E Investimentos Ltda.
ARCO Oil Limited
ARCO Petroleos Chile S.A.
ARCO Solar Nigeria Ltd.
Arpet Petroleum Limited
A/S Skaland Grafitiverk
Atlantic Richfield de Mexico, SA de CV
Atlantic Richfield Oil Limited
Badger Pipe Line Co.
Bingham Development Company
Black Lake Pipe Line Company
The British American Metals Company, Limited
Butte Water Company
Candel International Limited
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines, Ltd.
Chile Copper Company
Cobre de Hercules, S.A.
Companhia Atlantic de Petroleo
Compania de Petroleo Ganso Azul, Ltda.
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.
85819 Canada Limited
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Comp ny
Ericcson, Inc.
Flower Street Limited

Gravity Adjustment, Inc.
Greater Pacific Limited
Hardy Oil Company
Hondo Oil & Gas Company
Kenai Pipe Line Company
Mayflower Mining Company
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
Oil Shippers Service, Inc.
P.T. Artumin Indonesia
Park-Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedade Anonima Marvin
Solar Energy Center (E.C.)
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Co., Ltd.
United Park City Mines Company
Venezuelan Atlantic Transmission Corporation
West Mayflower Mining Company

CHAMPLIN PETROLEUM COMPANY

Champlin Petroleum Company is a wholly owned subsidiary of Union Pacific Corporation.

The subsidiaries and affiliates (except wholly owned) of Champlin Petroleum Company are:

Alameda Belt Line
The Alton & Southern Railway Company

Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
The Denver Union Terminal Railway Company
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Portland Terminal Railroad Company
Portland Traction Company
The Pueblo Union Depot and Railroad Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Stauffer Chemical Company of Wyoming
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Resources Ltd.

CONOCO INC.

Conoco Inc. is a wholly owned subsidiary of Conoco Delaware, Inc., which in turn is a wholly owned subsidiary of E.I. du Pont de Nemours and Company.

The subsidiaries and affiliates (not wholly owned) of Conoco Inc. are:

Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation

Conch International Methane Ltd.
Condea Chemie GmbH
Petroquimica Espanola, S.A. (PETRESA)
T.A.L.
T.A.L.
T.A.L.
Wabash Insurance Ltd.
Oil Insurance Ltd.
Conch L.N.G.
Conoco Exploration, Ltd.
T.A.L.
K/s Statfjord Transport A.S. & Co.
Statfjord Transport A.S.
Benzene Marketing Co. Ltd.
Associated Petroleum Terminals Ltd.
Cliffe Storage Ltd.
Crude Oil Terminals (Humber) Ltd.
Humber Oil Terminals Trustee Ltd.
Petroleum Storage Ltd.
Warwickshire Oil Storage Ltd.
K/s Statfjord Transport A.S. & Co.
Statfjord Transport A.S.
Bishop Coal Company
Gollin Wallsend Coal Co.
Conrhein Coal Co.
Cardinal River Coals, Ltd.
Neptune Bulk Terminals (Canada) Ltd.
Contochu Inc.
Harmar Coal Co.
Itmann Coal Co.
Mathies Coal Co.
Tongue River Holdings, Inc.
Tongue River Railroad
Carbon Black Espanola, S.A.
Compagnie Francaise du Carbon Black, S.A.
Lucky Continental Carbon Co., Ltd.
Oasis Oil Co. of Libya, Inc.
Colonial Pipeline Company

Dixie Pipeline Company
Explorer Pipeline Company
Lake Charles Pipe Line Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Seadock, Inc.
Seaway Pipeline, Inc.
Texas Offshore Port, Inc.
West Shore Pipe Line Company
Yellowstone Pipe Line Company
Felix Oil Company
Jupiter Chemical Inc.
Kettleman North Dome Assoc.
Long Beach Oil Development Company
Maritime Protection A/S
Ico-Nor A/S
Maritime Protection (PTE) Ltd.
Maritime Protection Inc.
Nippon Aluminum Alkyls, Ltd. (NAA)
Nissan-Conoco Corporation (NCK)
Oil Shippers Service, Inc.
Oberrheinische Mineraloelwerke GmbH (OMW)
PASA Petroquimica Argentina, S.A.
Petrocokes, Ltd.
Petroleum Terminals, Inc.
Iranian Investment Corp.
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
Iricon Agency, Ltd.
Southern Facilities, Inc.
The Standard Shale Products Company
Tidelands Royalty Trust
Boise Industrial
East Texas Saltwater
Fractionation Research, Inc.
Thermo Dynamics
Bristol Silver Mines
Bethlehem Steel Corp.

Littleton Fuel Co.
Rail to Water Transfer Corp.
Airport Limited Partnership
Allied Ensabba Ltd.
Concord Limited Partnership
Desarrollo Quimico Industrial, S.A.
Ducilo S.A.
Adela Investment Company S.A.
Aviones B.C., S.A. de C.V.
Derivados Macroquimicos, S.A.
Derivados Sinteticos, S.A. de C.V.
Gemeinnutzige Wohnungsbau GmbH
Halocarburos, S.A. de C.V.
La Domincia, de C.V.
Nylon de Mexico, S.A.
Inser S.A.
Univex, S.A.
Pigmentos y Productos Quimicos, S.A. de C.V.
Tetraetilo de Mexico, S.A.
Wilmington Trust Company
Du Pont Canada Inc.
Augusta Natural Gas Ltd.
Cedarcrest Company Limited
Du Pont Chemicals & Textiles (B.C.) Limited
Du Pont Chemicals & Textiles (Eastern) Limited
Du Pont du Quebec Limitee
Du Pont of Canada Exploration Limited
Ducanex Resources Limited
Twin Peak Resources
Petrosar Limited
Du Pont—Sankyo Pharmaceuticals K.K.
Mitsui Flourochemicals Company, Ltd.
Ebina Sangyo K.K. (Japan)
Mitsui Polychemicals Company, Ltd.
Bontec Company, Ltd.
EDOBI
Hiroshima Sekisui
Hi-Sheet Industries, Ltd.

Kyokuto Kobunshi Company, Ltd.
Kyushu Taiyo Kasei Company, Ltd.
KZM Company, Ltd.
Muromachi Company, Ltd.
Taiyo Kasei Company, Ltd.
PD Glycol Limited
PD Magnetics B.V.
Showa Neoprene K.K.
Societe En Nom Collectif Du Pont de Nemours (France) S.A. et Rhone-Poulenc Industries (Butachimie "SNC")
Syngas Company
Toyo Products Company, Ltd.

CRYSTAL OIL COMPANY

The subsidiaries and affiliates (except wholly owned) of Crystal Oil Company are:

Crystal Drilling Company
Crystal Exploration Company
Crystal Exploration and Production
Crystal Gas Resources
Crystal Program Ltd.

ENERGY RESERVES GROUP, INC.

The parents, subsidiaries and affiliates (not wholly owned) of Energy Reserves Group, Inc. are:

Clinton International Corporation

EXXON CORPORATION

The subsidiaries and affiliates (except wholly owned) of Exxon Corporation are:

Abu Dhabi Petroleum Company Limited
Abu Dhabi Company for Onshore Oil Operations
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit besohrankter Haftung

Aishin Sekiyu K. K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthaven, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Assistance Services S.A.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
BSB Gewerkschaften Brigitta und Elwerath
Betriebafuhrunggesellschaft m.b.H.
Bel-Air Entreposage S. A.
BTAS, Inc.
Building Products of Canada Limited
Byron Creek Collieries Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
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Compagnie d'Etancheite Africaine en Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condeo S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Daitsu Sangyo K.K.
Delta Hope & Twine Limited
Depot Petrolier du Grosivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelecentralen Aktiebolag
Dukhan Service Company
86129 Canada Ltd.
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskebet ef 12. juni 1964
Eiwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.bH.
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.

Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
European Gas & Electric Company
Exact Reisebyra A/S
Excess and Treaty Reinsurance Corporation
446259 Ontario Limited
FPE South Africa (Proprietary) Limited
F. T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjan de Colombia, S. A.
Fuji Kogyo K.K.
Fuji Uuyu K. K.
Fukui Sekiyu K.K.
General Busaan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwerath
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarro do Brasil S. A.—Equipamentos
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.

Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K. K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industrias Reliance S.A. de C.V.
Intecom, Inc.
Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B.V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Investment Promotion Enterprises Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shoshe
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten

K.K. Niimi Kirun
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsseiskebet af 8, oktober 1965
K/S Hoje Taastrup Storcenter 11
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kyguna Sekiyu Hambai Kabushiki Kaisha
Kawasaki Naiko Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kiinteisto Oy Myllynksllio
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LFL Investments, Inc.
La Compagnie Electrique Pioneer du Quebec, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzerisches Erdol
Les Dooks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu K.K.

Magyar Amerikai Olajipari Reszvenytarsasag
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maortgaz Ertekesito R. T.
Maple Leaf Petroleum Limited
Maquinas de Coser y Border Sigma, S. A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Mongeau & Robert Cie Ltee
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Moraine Properties Ltd.
95269 Canada Limited
Nakabayashi Sekiyu K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.

Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P. T. Stonvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petrole Assistance Lyon (S.A.R.L.)
Petrole Assistance Marseille (S.A.)
Petrole Assistance Orleans (S.A.R.L.)
Petrole Assistance Paris T.R. (SA)
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company, Inc.
Petrosvibri S.A.
Pipeline Service
Pipe Line Service Company, Inc.
Pipeline Service Iran
Pipeline Service U.K.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Polyolefins Product Co. Pty. Ltd.
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Qatar Petroleum Company Limited
Qualbank, Inc.
Raffinerie du Midi S.A.R.L.

Rainbow Pipe Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Reliance Electric & Engineering Company de Mexico S.A. de C.V.
Reliance Electric Limited
Reliance Electric Ltd.
Reliance Electric S.A. (Spain)
Renix Co. Ltd.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevoia (SAPPRO)
S & M Pipeline Limited
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.
Schubert KG
SEAG Aktiengesellschaft fur schweizerisches Erdol
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Skiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K. K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"

Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa per Azioni Raffineria Padana Olii Minerali—SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariesse
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliers "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHACO)
Societe d'Entrepoisage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Development d'Operations Commerciales
Societe du Ceoutohouc Butyl (SOCABU)
Societe du Depot Petrolier d'Hauconcourt
Societe du Parkings du Square Boucicaut
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe "Geomines-Caon"
Societe Harvaise de Manutention de Produits Petroliers

Societe Hoteliere de la Petite Compagne
Societe Immobiliere Paris-Niel
Societe Industrielle de Mecanique et d'Equipement Petrolier S.I.M.E.P. (S.A.R.L.)
Societe Italiana per l'Oleodotto Transalpino S.p.A.
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe du Pipeline Sud-Europeen
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologque de Gaz de Lavora
Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Suntech Company, Ltd.
Supertex, Inc.
Svensk Petroleumlagring Tre Aktiebolag
Syncrude Canada Ltd.
Synergistics Chemicals Limited
305120 Alberta Ltd.
346877 Ontario Limited
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellchaft Nurnberg mbH
Taihei Bussan K.K.
Taiko Skiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegersohen AG

Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tos Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Seikyuksgaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich
Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulupna Estates Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W. H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kaesi Kabushiki Kaisha
Westdeutche Erdolleitungs—G.m.b.H.
Westgas G.m.b.H.
Williamsport Properties Limited
Winnepeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex Distribution
Wrenford Insurance Company Ltd.

Yasaka Sekiyu, K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yusi Sekiyu K.K.
Yugan Kaisha Nishi Kobe Dosai Center

FARMERS CRUDE PRODUCTION COMPANY
(Formerly Farmers Petroleum Cooperative, Inc.)

Farmers Crude Production Company (formerly Farmers Petroleum Cooperative, Inc.) is a wholly owned subsidiary of Farmers Petroleum Cooperative, Inc.

GULF OIL CORPORATION

Gulf Oil Corporation is a wholly owned subsidiary of Gulf Corporation, which is a wholly owned subsidiary of Chevron Corporation.

The subsidiaries and affiliates (except wholly owned), of Gulf Oil Corporation are) :

A.S. Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Agricultural Anhydrous Ammonia Co. Ltd.
Alberta Products Pipe Line Ltd.
Alberta Underground Storage Limited
Allied-General Nuclear Services
Androgras S.A. (Switzerland)
Asia Polymer Corp.
Bio Research Company Limited
Canada Systems Group (EST) Limited
Cansulex Limited
Carnduff Gas Limited
Chicago Wire Goods Company
China Gulf Oil Company Limited
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company

Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Explorer Pipeline Company
G & C Realty Limited
Glen Park Gas Pipe Line Company Limited
Gulf Canada Limited
Gulf Oil Zaire S.A.R.L.
Harshaw Bryce & Co. Pty. Ltd.
Harshaw Galvanotecnia S.A.
Harshaw-Juarez S.A. De C.V.
Harshaw-Murata Kabushiki Kaisha
Hochtemperatur Reaktorbau GMBH
Hong Kong Refuelling Company Ltd.
Insco Holding & Finance Company N.V.
Interprovincial Pipe Line Limited
Java Gulf Limited
Kuwait Oil Company Limited
Laurel Pipe Line Company
Mainline Pipeline Limited
Mid-Valley Pipeline Company
Montreal Pipe Line Limited
Mozambique Gulf Oil Company
North River Energy Company
Northward Development Ltd.
Nova, An Alberta Corporation
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Peace Pipe Line, Ltd.
Pembroke Capital Company
Petromont, Inc.
Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pyro Power Corporation
Raffinerie De Cressier S.A.

Redwater Water Disposal Company Limited
Rimbey Pipe Line Co., Limited
Sarnie S.P.A.
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Syncrude Canada, Ltd.
Taita Chemical Corporation
Tensar Inc.
Trans Northern Pipe Line Company
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

HUNT OIL COMPANY

The subsidiaries and affiliates (except wholly owned) of Hunt Oil Company are:

Hunt Financial Corporation
Hunt Consolidated Resources Corporation
Portal Pipe Line Company
Paloma Pipe Line Company
Winona Corporation

IU INTERNATIONAL OIL & GAS, INC.

IU International Oil & Gas, Inc. is a wholly owned subsidiary of IU International Corporation.

The subsidiaries and affiliates (except wholly owned) of IU International Oil & Gas, Inc., are:

The Hawaiian Insurance & Guaranty Company, Limited
Hilo Coast Processing Company
Olokele Sugar Company, Limited
Wailuku Sugar Company
GWC Corporation
Boise Water Corporation
Eastport Water Company

Lambertville Water Company
Mechanicsburg Water Company
The New Milford Water Company
The New Rochelle Water Company
Warrenville Water Company
The Woodbury Water Company
IMS Lycrete Egypt, Ltd.
IMS Lycrete S.A.
Beaver Brook Land Company
C & H Transportation (Canada) Ltd.

MARATHON PETROLEUM COMPANY

Marathon Petroleum Company is a wholly owned subsidiary of Marathon Oil Company, which is in turn a wholly owned subsidiary of United States Steel Corporation.

The subsidiaries (not wholly owned) and affiliates of Marathon Petroleum Company are:

Arctic LNG Transportation Company
Kenai LNG Corporation
Oil Insurance Limited
Polar LNG Shipping Corporation
Hilton Head Management Co., Inc.
Lighthouse Realty, Inc.
Lighthouse Rentals and Management, Inc.
Petroleum Terminals, Incorporated
Tideland Realty of Hilton Head, Inc.
Tideland Realty of Ohio, Inc.
Tideland Timesharing, Inc.
The Airport Company of Hilton Head Island, Inc.
Badger Pipeline Company
City Point Oil Terminal, Inc.
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Globe Oil Company, U.S.A.
Gravcap, Inc.

Green Bay Terminal Corporation
Locap, Inc.
Loop, Inc.
Oil Insurance Ltd.
Oil Shippers Service, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Port Oil, Inc.
Qualbank, Inc.
Russell Stewart Oil Company
Soc. Italiana per L'Oleodotto Transalp., S.p.A.
Transalpine Finance Holdings, S.A.
Transalpine Olleitung in Osterreich GmbH
U-Save, Inc.
West Shore Pipeline Company
Wolverine Pipe Line Company
Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, Pa.)
Companhia Meriodional deMineracao
Brazaco-Mapri Industries Metalurgicas S.A.
ITW-Mapri
Mattheis
Mecania Walsywa, Ltda.
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltd.
Mineracao Xingu, Ltda.
Termerid Mineracao, SA
Torremco Soc. Min. E. Com. Ltda.
Deepsea Ventures, Inc.
Ocean Mining Associates—Joint Venture
FHS Stahlverformung GmbH
FHS Automotive Parts Manufacturing Ltd.
Industria de Tubos y Perfiles, S.A. (Intupersa)
Jupiter Mining and Prospecting Co. (Pty.) Ltd.
Minerales Ordaz C.A.

Les Enterprises du Lac Lucault, Inc.
SID-BEC-Normines, Inc.
Compagnie Miniere de l'Ogoorie (Comilog)
Feralloys, Ltd.
Zeerust Chrome Mines, Limited
Northern Tier Pipeline Co.
USS MaxTech Company, Ltd.
USS MaxTech Company (Japan), Ltd.
USS Technology (Japan), Ltd.
Adela Investment Company, S.A.
Altos Hornos de Vizcaya, S.A. (Attu)
Assoc. Manganese Mines of South Africa, Ltd.
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company
Chrome Deposit Corp. (Court Holdings J.V.)
Kappa Mining & Prospecting Co., Ltd.
LaPointe Iron Company
Navios Shipholding, Inc.
Navios Corporation
Navios Ship Management Services, Inc.
Oresteel Investments (Proprietary), Ltd.
P.T. Pacific Nikkel Indonesia
Prieska Copper Mines (Pty.) Ltd.
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour L'Exploration Des Monts Nimba (Mifuergui Nimba)
Terninoss Acciai Inossidabili—S.p.A.
Theta Mining & Prospecting Company (Pty.), Ltd.
Tilden Iron Mining Company
The West Union Canal Company
Zeta Mining & Prospecting Co. (Pty.), Ltd.
Bartow Chemical Products
Century IV Associates
Clean Air, Inc. Joint Venture
Fort Meade Chemical Products
Live Oak Uranium Operations
Mobile (I-65) Superstructure—Joint Venture
Morrison-Knudsen, Fishback & Moore

Natkin and Company
Paschen Contractors—Morrison-Knudsen
Pennzoil do Brazil, Ltd.
Rockland Joint Venture (Cost-Sharing)
RMI Company
Tenneco/USS Chemicals Joint Venture
TEX/USS Joint Venture
USS-OCF-W&M Joint Venture

MOBIL OIL CORPORATION
MOBIL PRODUCING TEXAS & NEW MEXICO, INC.
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

Mobil Oil Corporation is a wholly owned subsidiary of Mobil Corporation.

Mobil Producing Texas & New Mexico, Inc. and Mobil Oil Exploration & Producing Southeast, Inc. are both wholly owned subsidiaries of Mobil Oil Corporation.

The subsidiaries and affiliates (except wholly-owned) of Mobil Oil Corporation are:

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Ace Polymer Company, Ltd.
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Ltd.
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpha Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.

Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.

Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG

Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba. Deposito di Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gres Vaudan
Depot de Petrole Cotiers
Depots Petroliers de La Course (DPLC)
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissements Bouthenet
Establissements Nicol and Cie
Ets. R. Saillard
Establissements Wagner
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited

Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Ltd.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Immunizadoras Unidas, S.A.
Imperial Gas Co. of P.R., Inc.
Industria de Carbon del Valle Cauca, S.A.
Industria Interamericana de Filtros, Ltda. (INTERFIL)
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Iraq Petroleum Transport Company Limited
ISIDE, S.p.A.
Island Exploration Company Proprietary Limited

Istambul Petrol ve Makine Yasglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kygnus Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambail Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmhH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokuto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft, MbH
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonin. Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG

Mobil Nile Oil Company
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil de Mexico, S.A.
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corp., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha

Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P-6 Groep, B.V.
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe-Line Banal de la Gaulette
Pipe-Lines de al Pallice
Plegadizos para la Industria S.A.

Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S.A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi, Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
S.A. Ets Georges Dubois

Societe Anonyme Establissements Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gas D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun

Societe des Establissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-European
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Jean Roussel, S.A.
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Superior Oil Company
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH

Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Maintenance Kabushiki Kaisha
Tonen Sekiyu Kagagu Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company, Ltd.
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
WSG, Warmeservice GmbH
Wyco Pipe Line Company
Wymondham Oil Storage Company, Ltd.
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

NATIONAL COOPERATIVE REFINERY ASSOCIATION

The subsidiaries and affiliates (except wholly owned) of National Cooperative Refinery Association are:

Farmers Union Central Exchange
Farmland Industries, Inc.
Growmark, Inc.
International Tankship, S.A.
Jayhawk Pipeline Corporation
Land O'Lakes, Inc.
MFA Oil Company
Osage Pipeline Company
Seaway Pipeline, Inc.

SANTA FE ENERGY COMPANY

Santa Fe Energy Company is a wholly owned subsidiary of Santa Fe Natural Resources, Inc., which is a wholly owned subsidiary of Santa Fe Industries, Inc., which in turn is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation.

The subsidiaries and affiliates (except wholly owned) of Santa Fe Energy Company are:

Santa Fe Southern Pacific Corporation
Santa Fe Industries, Inc.
Advertising Direction Inc.
The Atchison, Topeka and Santa Fe Railway Company
Kirby Forest Industries, Inc.
Robert E. McKee, Inc.
SF Minerals Corporation
SF Coal Corporation
Santa Fe Mining, Inc.
Santa Fe Land Improvement Company
Santa Fe Natural Resources, Inc.
Santa Fe Energy Company
Santa Fe Energy Products Company
Santa Fe Pacific Railroad Company
Santa Fe Pipeline, Inc.
Gulf Central Pipeline Company

San Diego Pipeline Company
The Zia Company
Southern Pacific Company
Bankers Leasing and Financial Corporation
Bravo Oil Company
Southern Pacific Development Company
Southern Pacific Land Company
Black Mesa Pipeline, Inc.
*Southern Pacific Transportation Company

SIERRA PETROLEUM COMPANY, INC.

The subsidiaries and affiliates (except wholly owned) of Sierra Petroleum Company, Inc. are:

United American Bank and Trust Company
United American Financial Corporation
NBW Financial Corporation
Twin Lakes Financial Corporation
Hutchinson Financial Corporation

THE STANDARD OIL COMPANY (AN OHIO CORPORATION)

The subsidiaries and affiliates (except wholly-owned) of The Standard Oil Company (an Ohio Corporation) are:

Abrasives S.A. (Proprietary) Limited
Algers, Winslow & Western Railway Company
Alyeska Equipment Company
Alyeska Pipeline Service Company
Apache Powder Company
Arbomex, S.A. de C.V.
Arendal SIKA G.m.b.H.
Arendal Smelteverk a.s.

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* On December 23, 1983, Southern Pacific Company deposited all of the issued and outstanding shares of Southern Pacific Transportation Company in an independent voting trust with The Valley National Bank of Arizona as trustee.

Atlas Supply Company
BP Alaska Inc.
Brazniv Fiacao e Tecelagem Ltda.
Carborundum S.A.
Carborundum—Universal (Cape)
(Proprietary) Limited
Carborundum—Universal Estates S.A.
(Proprietary) Limited
Carborundum—Universal Natal
(Proprietary) Limited
Carborundum—Universal S.A.
(Proprietary) Limited
Carborundum—Universal Springs
(Proprietary) Limited
Carborundum—Universal Transvaal
(Proprietary) Limited
Carborundum—Universal (Vereeniging)
(Proprietary) Limited
Caridorn (Private) Limited
Colonial Pipeline Company
Delaware Bay Transportation Company
East Texas Salt Water Disposal Company
Eletro Metalurgica Abrasivos Salto Ltda.
Electrometalurgica de Veracruz, S.A. de C.V.
E. T. Irrigating Canal Company
Equipos y Procesos S.A.
F. E. Investments (Pty.) Ltd.
Ferix Corporation
G.L.C. Canada Inc.
Granalha de Aco, S.A.
Gravcap Inc.
Hindustan Dorr-Oliver Limited
Hitachi Carborundum Yugen Kaisha
Inland Corporation
Iranian Oil Participants Limited
Iricon Agency, Limited
Japan Purification Co., Ltd.
Keyline Agencies (Pty.) Ltd.

Lark Water Users
Laurel Pipe Line Company
Linkage Investments Limited
Mid-Valley Pipeline Company
Minera Cerro San Petro, S.A. de C.V.
Minera Santa Veronica, S.A. de C.V.
Minerales de Bolanos, S.A.
The National Filter Media Corporation
North Jordan Irrigation Company
Oil Insurance Ltd.
Paraho Development Corporation
Patel Filters Limited
Quebec Columbium Limited
Republic Abrasives (Proprietary) Limited
Ress Realty Company
Richards Bay Iron and Titanium (Pty.) Limited
S. F. Carborundum Joint Venture
Sohio/BP Trans Alaska Pipeline Capital Inc.
Stiffelio Investments (Proprietary) Limited
Stikine Copper Limited
Stoline Limited
Ta Kwang Refractories Co., Ltd.
Tisand (Proprietary) Limited
Tokyo Kokyu Rozai K.K.
Tokyo Kokyu Rozai Co., Ltd.
Toshiba Monofrax Kabushiki Kaisha
Universal Filter Media Ltd.
Utah and Salt Lake Canal Company
W and F Investments (Private) Limited
West Texas Gulf Pipe Line Company
White River Shale Oil Corporation

SUBURBAN PROPANE GAS CORPORATION

Suburban Propane Gas Corporation is a wholly owned subsidiary of National Distillers and Chemical Corporation. There are no subsidiaries and no affiliates (except wholly owned) of Suburban Propane Gas Corporation.

SUN EXPLORATION AND PRODUCTION COMPANY

Sun Exploration and Production Company is a wholly owned subsidiary of Sun Company, Inc.

The subsidiaries and affiliates (except wholly owned) of Sun Exploration and Production Company are:

Alaska Bulk Carriers, Inc.
Hemisphere Oil Company, Inc. (Puerto Rico)
Mid-Valley Pipeline Company
Suncor, Inc. (Canada)
Lugrasa, S.A. (Panama)
Nuestro Publications, Inc.
Vessey Chemicals Pty. Ltd. (Australia)
Carboline GMBH
Carboline Coatings Ltd. (New Zealand)
Carboline Southeast Asia Ltd. (Signapore)
Taranaki Blast Services Ltd. (New Zealand)
Japan Carboline Company (Japan)
Carboline Europe (France)
Carboline S.A. de D.E.C.V. (Mexico)
Lavan Petroleum Company (Lapco) (Iran)
Japan Sun Oil Company, Ltd. (Japan)
Glacier Bay Transportation Corporation
Oil Insurance Limited (Bermuda)
Becton, Dickinson and Company
Canyon Reef Carriers, Inc.
East Texas Salt Water Disposal Company
Van Salt Water Disposal Company
Deepsea Ventures, Inc.
Explorer Pipeline Company
Texoma Pipeline Company
West Texas Gulf Pipeline Company
Sun Olin Chemical Company
International Biomedical Instruments, Inc.
VLM Corporation
Nova (an Alberta Corporation) (Alberta, Canada)
Nottingham Gas Limited (Saskatchewan, Canada)

Redwater Disposal Company Limited (Alberta, Canada)
Sultran Ltd. (Alberta, Canada)
Sun-Canadian Pipeline Company Limited (Ontario, Canada)
Solartech Limited (Canada)
Trilliun Exploration Corporation (Canada)
Sundata Corporation
Petromech Svn. Bhd. (Malaysia)
Sunoco de Chile Ltda. (Chile)
Venezoil C.A. (Venezuela)
White River Shale Oil Corporation
Tretol Ltd. (United Kingdom)

TEXACO, INC.
(A DELAWARE CORPORATION)

The subsidiaries and affiliates (except wholly owned) of Texaco, Inc. are:

Societe Ivoirienne de Futs et d'Emballages (SIFEMBAL)
Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigera) Ltd.
Quimica Industrial "FIDES" S.A.
Texaco Canada, Inc.
Great Eastern Oil & Import Co. Ltd.
Lowry Fuels Ltd.*
McColl-Frontenac Oil Co., Ltd.*
Oilship Ltd.
Texaco Canada Resources Ltd.
Cynthia Gas Gathering Company Ltd.
Green River Exploration Co., Ltd.
La Societe Acadienne de Recherches Petrolieres Ltee.
214661 Resources Ltd.
Texaco France S.A.
Texaco Ghana Ltd.
Texaco Norway A/S
Norsk Texaco Oil A/S
Deutsche Texaco Aktiengesellschaft

Alpinol Mineralolhandel GmbH
Bonafides Grundstrucksverwaitungs-GmbH
Chevron Erdoel Deutschland GmbH
Mineralolprodukte-Saar Handels-GmbH Miprosa
Das Haus am Mittelweg GmbH
Das Versicherungsvermittlungs-GmbH
Deutsche Texaco Holding GmbH
Deutsche Texaco (Somalia) S.A.R.L.
Deutsche Texaco Verkauf GmbH
Edeleanu GmbH
Edeleanu Engineering Pte Ltd.
Societe des Petroles Concordia S.a.R.L.
Texaco Chimie S.a.R.L.
Texaco Exploration Italia S.p.A.
Thermotex Gesellschaft fur Fernwarme mbH
Texaco Portugal Prospeccao e Producae, S.A.R.L.
Texaco Greek Petroleum Co., S.A.
Mamafil Ltd.
Texaco Exploration Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Ltd.
Badger Pipe Line Co.
Canyon Reef Carriers, Inc.
Colonial Pipeline Co.
Coltexo Corp.
Dixie Pipeline Co.
Explorer Pipeline Co.
Felix Oil Co.
Kaw Pipe Line Co.
Laurel Pipe Line Co.
LOCAP INC.
LOOP INC.
Olympic Pipe Line Co.
Pembroke Capital Co., Inc.
Portland Pipe Line Corp.
Texaco-Cities Service Pipe Line Co.

Texas-New Mexico Pipe Line Co.
THUMS Long Beach Co.
West Shore Pipe Line Co.
Wolverine Pipe Line Co.
Wyco Pipe Line Co.
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
AK Deutsche Steinkohlenreviere GmbH
Aktiebolaget Djurgardsberg
Alberta Products Pipe Line Ltd.
American Overseas Petroleum Ltd.
American Overseas Petroleum (Spain) Ltd.
Amoseas Indonesia, Inc.
Arabian American Oil Co.
Trans-Arabian Pipe Line Co.
Associated Octel Co. Ltd., The
AK Chemie GmbH
Association Petroliere Beige
ATS Exploration Ltd.
Aviation Fuel Services Ltd.
Aviation Fueling Services S.A.
Aviation Service Center
Bergemann KG
Boske & Co. Mineralolhandel GmbH
Braunkohle-Benzin AG
Bremer Mineralolhandel GmbH
Bunkerservice Brunsbuttel GmbH
Caltex Deutschland GmbH
Caltex Mediterranean Ltd.
Caltex Petroleum Corp.
California Texas Oil Corp.
Caltex (Asia) Ltd.
Caltex Oil Hong Kong Ltd.
Tsuen Wan Properties, Ltd.
Caltex Shipping Co., Ltd.
Caltex Australia Ltd.
Australian Lubricating Oil Refinery Ltd.
Australian Oil Refining Pty. Ltd.

Caltex Oil (Australia) Pty. Ltd.
Australian Tanker Co.
Bayswater Colliery Co. Pty. Ltd.
Caltex Tanker Co. (Australia) Pty. Ltd.
Golden Fleece Petroleum
Hunter Pipe Line Co. Ltd.
Majik Markets Pty. Ltd.
Newcastle Pipeline Co. Ltd.
Sydney Metropolitan Pipeline Pty. Ltd.
Caltex Ceylon Ltd.
Caltex Eastern Ltd.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Caltex (Egypt) S.A.E.
Caltex (India) Ltd.
Caltex Indonesia Oil Co.
Caltex International Ltd.
Caltex International Services Ltd.
Caltex International Technical Center Pty Ltd.
Caltex (Iran) Ltd.
Caltex (Madagascar) Ltd.
Caltex (Middle East) Ltd.
Phoenicia Oil Co. S.A.L.
Caltex Oceanic Ltd.
Caltex Oil (Aden) Ltd.
Caltex Oil Botswana (Proprietary) Ltd.
Caltex Oil Corp. (Delaware)
Caltex Oil Corp. (New York)
Caltex Oil (Japan) Ltd.
Caltex Oil (Kenya) Ltd.
Caltex Oil Lesotho (Proprietary) Ltd.
Caltex Oil (Malawi) Ltd.
Caltex Oil Malaysia Ltd.
Caltex Oil Mauritius Ltd.
Caltex Oil (N.Z.) Ltd.
Caltex Gas New Zealand Ltd.
New Zealand Refining Co. Ltd., The
Texas Company (New Zealand) Ltd., The
Caltex Oil (Pakistan) Ltd.

Caltex Oil Products Co.
Caltex Oil (S.A.) (Proprietary) Ltd.
South African Oil Refinery (Proprietary) Ltd.
Caltex Oil Swaziland (Proprietary) Ltd.
Caltex Oil Tanzania Ltd.
Caltex Oil (Thailand) Ltd.
Caltex Oil (Uganda) Ltd.
Caltex Oil Zambia Ltd.
Caltex Oil Zimbabwe (Private) Ltd.
Caltex (Overseas) Ltd.
Honam Oil Refinery Co., Ltd.
Global Petroleum Co., Ltd.
Honam Tanker Co., Ltd.
Korea Tanker Co., Ltd.
Samkyung Petroleum Co., Ltd.
Shin Jung Transportation Co., Ltd.
Sungho Real Estate Company Ltd.
Saudi Aircraft Services Ltd.
Caltex (Philippines) Inc.
Batangas Land Co. Inc.
Philippine Petroleum Corp.
Caltex Philippines Petroleum Co., Inc.
Caltex Services Mid-Africa, Inc.
Caltex Services (Philippines) Inc.
Caltex Trading and Transport Corp.
Abu Dhabi Asphalt and Lubricants Co. Ltd.
Bahrain National Gas Co. (B.S.C.)
Bahrain Petroleum Co. BSC (Closed), The
Emirates Bunkering & Bitumen Co. (Private) Ltd. (EBBCO)
Singapore Refining Co. Private Ltd.
Star Holdings Co. Ltd.
Thai Oil Refinery Co., Ltd.
Caltex (U.K.) Ltd.
Caltex Services Ltd.
Central African Petroleum Refineries (Private) Ltd.
Eastern Hemisphere Insurance Ltd.
Caltex Investments and Trading Ltd.

Caltex Oil (S.W.A.) (Pty) Ltd.
Caltex Operations Ltd.
Farmer Construction Ltd.
Tanker Mooring Services Co. Private Ltd.
Kenya Petroleum Refineries Ltd.
Koa Oil Co., Ltd.
Kashima Seikansho Co., Ltd.
Koa Oil Overseas Co., Ltd.
Koa Petro-Gas Co., Ltd.
Mitsui Petro-Chemical Co., Ltd.
Ryoko Co., Ltd.
Ryoko Shoji Co., Ltd.
Sakae Kigyo Co., Ltd.
Union Oil Co., Ltd.
Toko Shokai Co., Ltd.
Lubland Ltd.
Mediterranean Refining Co.
Mid-East Trading and Investment Co.
Nippon Petroleum Refining Co., Ltd.
Kudamatsu Joint Disaster Prevention Center
Nippon Oil Staging Terminal Co., Ltd.
Ranhoku Joint Disaster Prevention Center
Tokyo Tanker Co., Ltd.
Pakistan Refinery Ltd.
Societe de Gestion des Depots Caltex
Societe Reunionnaise d'Entreposage (S.R.E.)
West Australian Petroleum Pty Ltd.
CandT Orient Inc.
Cia. Refinadora Petrolera Santo Domingo, Inc.
City Parkeorgarage (City Parking) B.V.
Compagnie d'Entreposage Communautaire (C.E.C.)
Condea Chemie GmbH
Condea Chimie S.a.R.L.
Dannenberg & Co. Mineralolhandel GmbH
Deutsche Transalpine Oelleitung GmbH
Deutscher Kraftverkehr Ernst Grimmke GmbH
Drivmedeiscentralen A.B.
Erdgas-Verkaufs-GmbH

Federated Pipe Lines Ltd.
Flexibox GmbH
Forenade Svenska Oljeimportorers AB (FSOA)
Ghana Bunkering Services Ltd.
Glen Park Gas Pipe Line Co. Ltd.
Hamburger Mineralol-Transport GmbH
Heddington Brokers Ltd.
Hertfordshire Oil Storage Ltd.
HoeTex Beteiligungs-GmbH
Iranian Oil Participants Ltd.
Oil Service Co. of Iran (Private Company)
Iraanse Aardolie Exploraties en Producte Mattschappij (Iranian Oil Explor. & Prod. Co.) N.V.
Iraanse Aardolie Raffinage Maatschappij (Iranian Oil Refining Co.) N.V.
Iranian Oil Services (Holdings) Ltd.
Iranian Oil Services Ltd.
Karl Becker & Co. Mineralolhandel GmbH
Karlsruhe-Stuttgart Rohrleitung GmbH
Knoops & Muller Mineralolhandel GmbH
Kux & Krahn Mineraloele GmbH
Louis Hagel Mineralol-Handels-GmbH
LPG de Panama, S.A.
Maghreb Gaz S.A.
Mainline Pipelines Ltd.
Mdina Weave Ltd.
MHB Mineralolhandel GmbH
Milan Airport Refueling Services, S.p.A. (MARS)
Mitsui Texaco Chemicals Co., Ltd.
Montreal Pipe Line Co., Ltd.
Motorway Services, Ltd.
N V Rotterdam Rijn Pijppleiding Maatschappij
OMW Oberrheinische Mineralolwerke GmbH
P.T. Caltex Pacific Indonesia
Pars Investment Corp.
Petrogas, S.A.
Piomotora de la Interconexion de los Gasoductos de la Costa Atlantica

Pipelines of Puerto Rico, Inc., The
Rheem del Ecuador C.A.
Rhein-Main-Rohrleitungstransportgesellschaft mbH
Salland Olie Maatschappij B.V.
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Sierra Leone Petroleum Refining Co. Ltd., The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Scanraff, Inc.
Societa Italiana per l'Oleodotto Transalpino
Societa per Azioni Raffineria Padana Olil Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Agricole des Entreprises Petrolieres (SADEP)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe Belge de Transport Par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe de Cabotage Petrolier (PETROCAB)
Societe de Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe d'Entreposage De Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe du Pipeline Sud-European S.A.
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)
Societe Guineenne de Lubrifiants et d'Emballages (SOGUILUBE)
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Societe Ivoirienne D'Entreposage De Products Petroliers (S.I.E.P.P.)
Societe Ivoirienne de Raffinage S.A. (SIR)
Societe Malienne d'Entreposage (SME)
Societe Nationale de Raffinage (SONARA)

Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
Steag AG
Svensk Petroleumadministration A/B
Svensk Petroleum Forvaltning Aktiebolag
Svensk Petroleumlagring Tre Aktiebolag
Tankaniage Reumiang AG (TAR)
Texaco Maroc
Plastumar
Tadiagaz S.A.
Texaco Mexicana, S.A. de C.V.
Fabricacion y Distribucion de Productas, S. de. R.L. (FADIPCO)
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Servicios Corporativos Temesa, S.A. de C.V. (SERVICORP)
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Transalpine Finance Holdings, S.A.
Transalpine Olleitung in Osterreich GmbH
Trans Northern Pipeline Inc./Pipelines Trans-Nord Inc.
Trinidad Asphalt Holdings Ltd.
Trinidad Northern Areas Ltd.
Trinmar Ltd.
Trintovac Developments Ltd.
204383 Enterprises, Ltd.
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W. Knierim & Co. Mineralolhandel GmbH
Zaire-Services des Entreprises Petrolieres (Zaire S.E.P.)
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* * * *

The following corporate petitioners do not have any parent companies, subsidiaries or affiliates (except wholly owned):

Austin Drilling Company
Braden-Zenith, Inc.
Columbus Drilling Company
Energy Consumers and Producers Association, Inc.
Herndon Drilling Co.
Kirkwood Oil and Gas Company
Muskegon Development Company
Petroleum Management, Inc.
Rhude & Fryberger, Inc.
Ruthven, Inc.
Saline Supply Company, Inc. (formerly Pioneer Operations Company, Inc.)
Sklar & Phillips Oil Company
Stelbar Oil Corporation, Inc.
Wico Oil Company
Will I. Lewis Enterprises, Inc.
Wood Oil Company

Office - Supreme Court, U.S
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ALEXANDER L. STEVAS,
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No. 84-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., et al.,
Petitioners

v.

DEPARTMENT OF ENERGY, et al.,
Respondents

BRIEF OF RESPONDENTS PHILADELPHIA ELECTRIC COMPANY, GERALDINE H. SWEENEY, RJG CAB INC., AND NATIONAL FREIGHT, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I.

COUNTERSTATEMENT OF THE CASE

A. The Challenged Legislation, Congressional Intent, and the Legislative Vetoes

The central facts which distinguish the instant situation from that addressed by the Court in *Immigration and Naturalization Service v. Chadha,* 103 S. Ct. 2764 (1983), the case upon which Petitioners rely, and which make its ruling inapplicable are:

1. The statutory provisions Petitioners seek to invalidate, which mandated the promulgation by the President of price controls on the first sale of domestic crude oil, were not subject to legislative veto. Emergency Petroleum Allocation Act of 1973, Section 4(a), Pub. L. No. 93-159, 87 Stat. 627 (1973) (hereinafter cited as "EPAA"), *as amended by* the Energy Policy and Conservation Act, Section 401, Pub. L. No. 94-163, 89 Stat. 871 (1975) (hereinafter cited as "EPCA"). It is those mandated price controls which the Petitioners violated, and which have been upheld as a valid exercise of the statutory mandate. *In re Department of Energy Stripper Well Exemption Litigation,* 520 F. Supp. 1232 (D. Kan. 1981), *rev'd,* 690 F.2d 1375 (Temp. Emer. Ct. App. 1982), *cert. denied,* 459 U.S. 1127 (1983). The President had the power to promulgate and amend the mandatory price regulations without any possibility of legislative veto, and subject only to the requirement that such regulations be consistent with the statutory mandate. *Consumers Union v. Sawhill,* 525 F.2d 1068 (Temp. Emer. Ct. App. 1975). The only presidential powers which were both subject to legislative veto and had some possible impact on crude producers, were (i) the power to temporarily suspend the mandatory price controls for ninety (90) days (EPAA, Section 4(g)(2) *infra*) and, after its elimination the more limited power to increase the price ceiling to offset inflation

and create production incentives. (EPCA, Section 401(a)).

2. It was the clear unconditional intent of Congress at all time to mandate price regulation of crude oil. As Petitioners themselves acknowledge, such was the reason for the enactment of the EPAA. (Petition for Writ of Certiorari, at 19, hereinafter cited as "Petition"). The only concession to the President's opposition was the right to propose temporary ninety day decontrol, and it is that power which was coupled with, and subject to, the legislative one-house veto. EPAA Section 4(g)(2). Moreover, when the EPAA was continued, by means of the EPCA, even that power to decontrol for ninety days was eliminated (EPCA, Section 455) and the President given the right only to propose additional (to that provided by statute) ceiling price increases to meet inflation and provide production incentives, and that power was coupled with and subject to legislative veto (EPCA, Section 401(a)).

3. The only Presidential Actions legislatively vetoed were two proposals for new legislation. Although ostensibly submitted under the President's right to propose temporary decontrol for not more than ninety days, the actions were clearly not proposals under EPAA Section 4(g)(2). Instead, they were proposals to revamp the statutory scheme, to wit, to end unchanging fixed ceilings on the price of domestic crude oil and substitute a legislative program combining (i) a gradual increase in the ceiling price to affect decontrol, first over thirty and then over thirty-nine months, and (ii) a windfall profits tax with a provision to provide rebates to consumers adversely affected by such decontrol. 40 Fed. Reg. 30,030, 30,035-36 (1975); 40 Fed. Reg. 31,741 (1975); Veto of a Petroleum Price Review Bill II Pub. Papers of President Ford, 1007 (July 21, 1975); Appendix I to the Petition, pp. 312a *et seq.*

The circumstances under which these Presidential proposals were made and under which the legislative ve-

toes were exercised were that the EPAA, as extended, was expiring with Congress desiring to extend it and the President desiring decontrol (Petition, at 20). The President's proposals were, accordingly, a proposal of compromise legislation, made ostensibly under the EPAA decontrol provisions so as to obtain, as they indeed did, an immediate Congressional response. 121 Cong. Rec. 23,983-84,25,881-82 (1975). When Congress rejected them, the President and Congress agreed by legislation, duly enacted and signed, first for a continuation of the fixed unchanging ceiling prices without decontrol until new legislation could be passed, Emergency Petroleum Allocation Act Extension, Pub. L. No. 94-99, 89 Stat. 481 (1975), and then to a continuation of fixed price ceilings on the sale of crude oil for the period over which the President had proposed its total decontrol, with a very limited inflation and incentive related increase in ceiling price over that period. EPCA, Section 401(a).

B. Identification of Respondent End Users

The respondents[1] are end users of oil products seek-

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1. Intervenor Philadelphia Electric Company, granted intervention by the District Court on April 7, 1983, is an investor-owned public utility providing electricity, steam and gas to customers in Pennsylvania and Maryland. It seeks to be certified as class representative of all investor-owned electric, gas and steam generating public utilities using oil products for the generation of electricity, steam and gas throughout the United States. Such utilities consumed seven (7%) to eight (8%) percent of all oil products in the United States.

Intervenor National Freight, Inc. granted intervention by the District Court on April 7, 1983, is a corporation engaged in the business of hauling freight interstate by truck, and consumed oil products, principally diesel fuel, to power its trucks. It seeks to be certified as class representative of all trucking companies and other commercial users of diesel fuel and motor oils for use in motor vehicles. Intervenors RJG Cab Inc., a taxicab company, and Geraldine H. Sweeney, an automobile owner, were granted intervention by Judge Theis on July 20, 1984, and will seek certification as class representatives of all commercial and non-commercial surface transportation users of oil products, including gasoline and diesel fuel.

(Continued)

ing to act on behalf of surface transportation and utility end users of oil products, who in the aggregate consumed during the relevant period approximately fifty (50%) percent of all oil products in the United States. Accordingly, they assert a claim to fifty (50%) percent of the fund paid into Court, or due so to be paid, to the extent to which the fund is properly returned to end user consumers. They argue for, and have proposed in specific terms to the Office of Hearings and Appeals of the Department of Energy (OHA), to whom the matter has been referred by Judge Theis, an alternative method of distribution of the fund to that proposed by the States and the Refiners, and are participating in the current proceedings before OHA. *See*, Memorandum and Order of Referral for Fact Finding to Administrative Agency, MDL 378 (D. Kan. September 14, 1983).

II.

SUMMARY OF ARGUMENT

Petitioners seek a writ of certiorari for the purpose of obtaining an extension of the principle of *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983) to invalidate provisions of statutes (EPAA and EPCA) not subject to complained-of legislative vetoes. They further seek to justify the grant of certiorari on the basis that this is an appropriate case in which the Court may determine the retroactive effect of *Chadha*.

Indeed, unless this Court is prepared to so extend the *Chadha* in a manner inconsistent with the rule of *Chadha*, the issue of retroactivity will not and cannot be

FOOTNOTE ONE *(Continued)*

Surface transportation accounted for more than forty (40%) percent of the oil product consumption in the United States during the period of regulation, 1973 through 1981.

The Court has deferred action on the petitions for class certification, pending the report of OHA pursuant to the referral to it. (Memorandum and Order of Referral, *infra*).

reached by the Court since there will be no invalidation of the portion of the statute which Petitioners seek to have invalidated retroactively.

Accordingly, the instant case is an entirely inappropriate one in which to deal with the retroactivity issue as well as an inappropriate one in which to further define the scope of the rule enunciated by the Court in *Chadha*.

Application of *Chadha* to the instant situation even on a prospective basis would require the Court to ignore the intent of Congress — which was to impose mandatory price controls on crude oil — solely because the statute provided the President the ability to propose limited relief from such controls, subject to a legislative veto. It would also provide standing to challenge legislative provisions not affected by, or subject to, a legislative veto, a reach of *Chadha* not only inconsistent with the principle enunciated in that case, but also raising serious Article III standing concerns.

Petitioners would require the Court to substitute for the expressed intent of Congress speculation that Congress was willing to abandon such an expressed intent in the face of the fear of a Presidential veto and the inability to override the veto. In essence, such an extension of *Chadha* would substitute the *perceived intent* of the *President* for the *expressed intent* of the *Congress*.

Finally, Petitioners seek in the alternative to give effect to two legislatively vetoed decontrol provisions in a situation in which, *inter alia,* (i) the decontrol proposals were clearly not within the statutory contemplation but rather proposals for new legislation, and where (ii) the decontrol proposals were retroactively withdrawn by legislation signed by the President.

Inasmuch as these Respondents believe that, since *Chadha* is not applicable, the issue of retroactivity cannot be addressed by the Court and inasmuch as it is contemplated that the issue of retroactivity will be adequately briefed by other Respondents, this brief will concern itself principally with the basic inapplicability of the

Chadha principle to invalidate the mandatory regulation of crude oil production.

Respondents will also note briefly the lack of merit in Petitioners' attempt to obtain effectuation of two decontrol provisions not authorized by statute, and of decontrol provisions never submitted.

III.

ARGUMENT

A. The *Chadha* Rule is Inapplicable to the Instant Case: Both as a Matter of Congressional Intent, and as a Matter of Law, a Provision for Legislative Veto of Decontrol Provisions Does Not Provide a Basis For Challenging Mandatory Price Regulations Not Subject to Legislative Veto.

The crude oil price controls, limiting the price which could be charged for domestic crude oil on first sale, are the target of the Petitioners in the *Department of Energy Stripper Well Exemption Litigation, supra.* It is those controls which the Petitioners violated and which they have tardily sought to invalidate. These price controls, mandated by the EPAA, through its original expiration date, February 28, 1975, by virtue of three extension amendments to December 15, 1975 (*See,* Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975), and thereafter, by the extension of the EPAA through the EPCA, were not subject to legislative veto.

Until the enactment of the second of those three EPAA extensions on September 29, 1975 (retroactive to August 31, 1975), the President had the power, subject to legislative veto, to "prescribe an amendment" to those mandatory regulations, exempting "crude oil . . . from such regulation for a period of not more than 90 days."

(EPAA, Section 4(g)(2)).[2] The EPCA formally eliminated the President's power to propose temporary decontrol of crude oil, and provided for a gradual increase in the price of crude oil beginning February 1976, and acceleration of such ceiling price increases by Presidential proposal, subject to a legislative veto. Appendix G to the Petition, pp. 160a *et seq.*

1. *The EPAA — Congressional Intent*

The price regulations, including most particularly the control of crude oil prices, were mandated by a Congress which, as Petitioners correctly note "believed that the national energy crisis required the prompt enactment of a statute mandating the imposition of controls" and which "recognized that the President's opposition to mandatory controls was strong." (Petition, at 18). Indeed, both the House and Senate versions of the EPAA, containing the mandate of price controls but without any Presidential decontrol authority, passed by overwhelming margins, 337 to 72 in the House and 85 to 10 in the Senate. (119 Cong. Rec. 34,477; 119 Cong. Rec. 18,064 (1973).

The Presidential decontrol authority and the accompanying right of Congress to veto its exercise were added in the Conference Committee, 119 Cong. Rec. 36,866 (1973) and, as Petitioner's acknowledged, "the EPAA's *decontrol* provisions would not have been passed by Congress without the legislative veto provisions." (Petition, at 19, emphasis supplied.)

Why the Congress added the Presidential decontrol authority and the legislative veto of such authority is a matter of speculation, and indeed some mystery. Congress clearly had the apparent votes necessary to over-

2. The provision permitting Presidential proposed crude oil decontrol was effectively eliminated by the agreement of the President and the Congress in the EPAA extension of September 29, 1975, retroactive to August 31, providing that "the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy. . . ."

ride a veto, and indeed in the only cited reference to a possible veto in the Congressional debate (cited by Petitioners in their Brief below but omitted from the Petition for Certiorari). Representative Robison, after noting that the President had announced a mandatory allocation program on October 2, concluded:

> "It would thus appear Mr. Chairman that both administration and the Congress have been moving in their own ways and in their own time frames . . . toward the same position, which leads me to believe that, despite reports to the contrary, *this bill may not be subject to the test of Presidential veto.* 119 Cong. Rec. 34,476 (1973) (emphasis supplied).[3]

Whatever dispute may exist as to whether in *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.) *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984 (No. 84-20)), the Temporary Emergency Court of Appeals was or was not articulating the proper standard of severability and whatever dispute may exist about whether the *Dyke* Court and the Court below were correct in severing the legislative veto and leaving intact the Presidential decontrol provisions, there is no serious question about the Congressional intent with regard to the mandatory price regulations: Congress intended that such be promulgated and enforced.

As this Court has made clear, the statutory provisions for mandatory price regulation, and the statute

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3. The only other "evidence" cited by Petitioners, the Senate's sustaining a veto of a subsequent bill which would have rolled back domestic crude oil prices (Petition, at 18), hardly proves anything about the likelihood either of a veto or of it being sustained as to mandatory price regulations. Indeed, the evidence is to the contrary; the President signed the EPAA containing mandatory price controls, and did not propose their elimination until, and only as a part of, his effort to obtain gradual decontrol in the extension of the EPAA by the EPCA. Indeed, then, he signed a bill which eliminated his authority to propose temporary total decontrol of crude oil prices. EPCA, Section 455.

itself, fall only if "it is evident that the Legislature would not have enacted those provisions which are within its power independently of that which is not." *Chadha, supra,* at 2774, *quoting Buckley v. Valeo,* 424 U.S. 1, 108 (1976) and *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210,234 (1932).

To the contrary, in the instant case, it is indeed evident, *inter alia,* from the overwhelming votes in both the House and Senate approving those mandatory price provisions in earlier versions of the EPAA without either decontrol authority or legislative veto, that Congress would have enacted such provisions without decontrol authority and the attendant legislative veto.

Indeed, Petitioners do not argue to the contrary. The furthest extent of their argument is that Congress was afraid to pass such a statute even though it desired to do so because of fear of (i) Presidential veto, and (ii) an inability to override such a veto. As to such a contention, the evidence is all to the contrary. As to the likelihood of veto, the only Congressional debate reference, cited above, suggested that such was not likely, and more importantly the fact is that the President did sign the EPAA containing the obligation to promulgate mandatory price regulations, with only the right to propose ninety day decontrol and with clear evidence from the Congressional vote on the EPAA that should the President attempt to do so, Congress would exercise its legislative veto. As to the concern about the ability to override a veto, the vote on the House and Senate versions would appear to indicate clearly that the votes existed to override.

Thus, Petitioners' argument requires speculation which is inconsistent with a rational judgment on the part of Congress about its power to work its will.

Moreover, it implicitly treats legislation as the equal right of the President and of Congress, ignoring both Article I's assignment of the legislative function to the Congress and this Court's statement that the test is what the "*Legislature* would" have enacted, had it known that the

legislative veto provision was unconstitutional. *Chadha, supra,* at 2774 (emphasis supplied). Where, as here, presumably both the Congress and the President acted on the mistaken assumption that a legislative veto was valid, it is the evident will of Congress to eliminate the Presidential decontrol authority which must be implemented, not the speculated-upon will of the President to veto the entire bill absent his right to decontrol. To do otherwise would impermissibly assign the legislative function to the executive by recognizing his will as superior to that of the Congress.

The proper application of the test of the Congressional intent as enunciated in *Chadha, supra,* and in *Consumer Energy Council of America v. F.E.R.C.,* 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd,* 103 S. Ct. 3556 (1983) would strike both the legislative veto *and* the decontrol authority subject to it, leaving intact the mandatory price regulations and in particular the crude oil price regulations which "injured" Petitioners. Such a result would be consistent with the decisions in two cases upon which Petitioners rely, *McCorkle v. United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978) and *American Federation of Government Employees v. Pierce,* 697 F.2d 303 (D.C. Cir. 1982). In those cases the courts struck down both the Congressional right to act without a full legislative enactment and the executive power or prohibition to which it was attached. And in both cases, the severance of the executive action or limitation and the Congressional power left intact the underlying statutory provisions. In the *McCorkle* case, the statutory provisions establishing federal pay scales and a related provision limiting certain civil service salaries were enforced. In the *Pierce* case, an appropriation to the Department of Housing and Urban Development was upheld. In neither case, does the Court engage in speculation about what Congress would have intended with regard to the remaining provisions had it feared Presidential veto and an inability to override.

2. *The EPCA — Congressional Intent*

If it was possible for Congress to express its intent to mandate crude oil price controls even more clearly than it did in the EPAA, it did so in the EPCA. For although providing for limited increased crude oil prices over time and permitting Presidential proposed acceleration of such price increases subject to legislative veto, it removed the President's previously existing power to propose total decontrol of crudeoil, even temporarily.

Whether the Congressional intent is best effectuated by severing both the legislative veto provisions and the accelerated decontrol provisions subject to the legislative veto, or merely by severing the legislative veto, is a more difficult question than in the case of the EPAA. Arguably, the Congress might have been willing to extend the more limited decontrol authority provided by the EPCA to the President even without a legislative veto, having prohibited full crude decontrol.[4]

The issue whether to strike the legislative veto alone, or the veto and accelerated decontrol provisions together,

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4. On the one hand, as Petitioners note (Petition, at 20), both the Senate and House reports stressed the importance of the legislative veto provisions and the Senate had specifically voted to retain veto powers, all of which suggest that accelerated decontrol of crude oil and optional decontrol of refined products might not have been permitted absent a legislative veto. The elimination of a severability clause in the Conference Committee (Petition, at 21) similarly supports the inseverability of the Presidential power and the legislative veto; had such a provision remained it could have been used to sever the veto only. On the other hand, since the legislation looked to limited increased crude oil prices within its mandatory provisions, an argument can be made that the acceleration of such was consistent with Congressional intent, even absent a legislative veto. Moreover, a holding that the Presidential optional decontrol provisions as to refined products should be severed together with the legislative veto to which they were subject would create a potential in other cases for claimants to assert that they were injured by such accelerated or earlier decontrol of refined products and might subject Petitioners here in their capacity as refiners of product to overcharge claims.

is not however one which requires resolution, since it is clear that under no circumstances did Congress intend to abandon mandatory crude oil price controls, which are the only provisions under this statute which Petitioners seek to invalidate. They can assert no injury from a legislative veto of proposed accelerated decontrol since there were no such vetoes. Nor do they even suggest any instance in which the President was deterred from proposing crude oil price decontrol by the threat of veto; indeed they could not since the EPCA removed the possibility of proposed full decontrol of crude oil.

As to the speculation that Congress "intended", even though it did not desire, to extend to the President accelerated decontrol authority for fear of veto and inability to override had such not been provided, the argument is far more speculative even than when made in connection with the passage of the EPAA. What the President had demanded in his proposals to the Congress in connection with the drafting of the EPCA, made in the form of a thirty month decontrol proposal under the EPAA, 40 Fed. Reg. 30,030, 30,035-36, and then in a thirty-nine month decontrol proposal, 40 Fed. Reg. 31,741 was a foreseeable end to control and some relaxation of controls through the period, and that is what the Congress passed in the EPCA (Appendix G to Petition, pp., 160a *et seq*). Since the provisions of the EPCA not subject to legislative veto met the President's basic demands, there is no reason why Congress should have feared a Presidential veto; indeed his acceptance of a ban on even temporary full decontrol of crude prices and his acceptance of very strict legislative veto provisions as to increasing crude prices and decontrol of refined products suggest the contrary. As to the fear of inability to override a veto, nothing can be drawn from the vote (Petition, at 20) since all votes were on bills already containing the presidential decontrol authority and the legislative veto; indeed, both in the House and Senate the votes in favor of the legislation after conference were fewer than before, indicat-

ing that as the legislation was weakened it had less support, and raising the possibility that had it been strengthened to remove decontrol authority in the President it might have picked up enough strength to permit override. 121 Cong. Rec. 9868, 29,852, 40,735, 41,196 (1975).

3. *A Possibility Of Legislative Veto Which Does Not Reach Mandatory Price Regulations Provides No Basis For Their Invalidation As A Matter Of Logic And Law.*

An alternative analysis which reaches the same result as that discussed above concerning Congressional intent rests upon the recognition that the challenged legislative veto does not extend to the mandatory price controls which Petitioners seek to challenge, but only to actions relieving the regulated from the impact of such controls. Both fundamental Article III principles of standing and simple logic insulate from attack the mandatory price regulations where the complained upon legislative veto does not reach them. As a matter of logic the only injury related to a legislative veto can stem from either the legislative veto itself (in the case of those who would be benefitted by decontrol) or from the decontrol provision (in the case of those who would be harmed by decontrol, *i.e.*, the protected public). Put in traditional proximate cause terminology, the injury which Petitioners allegedly suffered as a result of the existence of the legislative veto was the exercise or failure to exercise the decontrol authority; the veto is no more logically connected to the mandatory price regulations than it would be if the decontrol authority and the related veto were the subject of separate legislation.

Article III principles of standing compel the same results. As this Court has recently summarized the applicable three part test of standing, it requires "the party who invokes the Court's authority to show that he personally has suffered some actual of threatened *injury as a result of the putatively illegal conduct of the defend-*

ants and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted) (emphasis supplied). *See also, Warth v. Seldin*, 422 U.S. 490 (1975). "Injury" from the mandatory price regulations, the real complaint of Petitioners, does not stem from the legislative veto or even from the decontrol authority subject to such legislative veto. Accordingly, injury from the mandatory price regulations cannot be reached in a challenge to the legislative veto. The legislative veto provides no standing to Petitioners to do so.

As already noted, the limit of the reach of a challenge to a legislative veto was implicitly recognized in *McCorkle v. United States, supra,* and in *American Federation of Government Employees v. Pierce, supra,* where the Courts limited their consideration to the Congressional non-legislative action and the executive actions or limitations subject thereto, never even considering the basic statutory provisions as being under attack by virtue of the challenge. And, even closer in point, two District Courts in which an attempt was made to reach the mandatory price regulations of the EPAA through an attack on the constitutionality of the legislative veto have recognized the standing barrier and rejected the attacks. *Citronelle-Mobile Gathering, Inc. v. Gulf Energy Corp.*, 420 F. Supp 162 (S.D. Ala. 1976), *remanded on other grounds*, 578 F. 2d 1149 (5th Cir. 1978), *appeal dismissed on other grounds* 591 F. 2d 711 (Temp. Emer. Ct. App. 1979), *cert. denied*, 444 U.S. 879 (1980); *United States v. Exxon Corp.*, 4 Energy Mgmt (CCH) ¶26,447 (D.D.C. August 29, 1983), *appeal pending*, No. DC-93 (Temp. Emer. Ct. App.). It is true that in the recent TECA decision in *Dyke, supra,* and in the instant matter, the court fails to invoke the standing barrier, instead merely finding that the legislative veto provisions in the EPAA and EPCA may be severed from the presidential decon-

trol provisions. However, such a finding made it unnecessary to consider the issue of whether the challenge to the veto reaches the mandatory price regulations, an issue which becomes relevant only when the Court finds the legislative veto and the presidential or executive actions inseverable, as in *Pierce* and *McCorkle, supra.*

In no case to the knowledge of these Respondents has the principle of *Chadha* been applied to strike statutory provisions not subject to legislative veto. To do so here, particularly in the face of a clear Congressional intent to the contrary, would subvert, not implement, the *Chadha* rule and would require the Courts facing the *Chadha* issue to determine not what Congress intended but rather what Congress believed it had the power to accomplish legislatively in the face of possible Presidential veto. This is hardly a case in which the Court might properly explore the "full range of issues regarding the scope and application" of *Chadha.* (Petition, at 3).

B. Even If The Legislative Veto Alone Is Properly Severed From The EPAA and EPCA, Petitioners Cannot Benefit From The Two Crude Oil Phase-Out Amendments Actually Proposed Nor From Those Which Might Have Been Proposed But Were Not.

Petitioners' arguments seeking to give effect to two proposed crude oil phase out amendments which were proposed by the President and to others which were never made at all depend upon the severability of the legislatively veto alone. (Petition, at 22-28). If, on the other hand, as these Respondents argue, the proper severance under the EPAA (and possibly under the EPCA) is of both the Presidential decontrol provisions and the legislative veto to which they were subject, then (i) neither the two phase out amendments, (ii) nor any amendments which might have been made, can be given effect because the statutory authority for their promulgation has been eliminated. Moreover, with regard to a the EPCA, any amendments

which might have been proposed, but were not, could not have resulted in decontrol of crude oil because the statute did not allow such proposals.

But even if severance is of the legislative veto power alone, leaving intact the Presidential decontrol authority, as the Court below has suggested, neither the two phase out amendments to the EPAA actually made and vetoed legislatively nor some ephemeral amendments to either statute which might have been made, but were not, can be properly given effect.

1. *The Two Phase-out Crude Oil Amendments Were Null And Void* Ab Initio *Since They Were Not Within The President's Statutory Authority.*

As the August 31st date for the expiration of the EPAA approached, with the President seeking decontrol of crude oil and the Congress desiring to continue to control, the President proposed a compromise — decontrol on a phase-out basis. The vehicle for his legislative proposals was ostensibly EPAA Section 4(g)(2), a provision permitting him to propose decontrol entirely of crude oil for a "period of not more than 90 days." Presumably, the reason for so submitting his legislative proposals is that the time limit on the exercise of a legislative veto assured, and indeed obtained, a prompt response from Congress. His thrity-month decontrol proposal was submitted on July 16 and rejected by Congress on July 22 (40 Fed. Reg. 30,030, 30,035-36 (1975); 121 Cong. Rec. 23,983-84 (1975)). His longer thirty-nine month phase-out proposal was submitted July 25, 1975 (40 Fed. Reg. 31,741 (1975)) and also was rejected promptly on July 30, 1975. (121 Cong. Rec. 25,881-82 (1975)).

That what the President intended in his decontrol "amendment" proposals was actually new legislation is clear from his assurance to Congress in urging action on the 30 month phase-out that it was part of a package including a windfall profits tax, import fees and rebates to consumers, (Veto of a Petroleum Price Review Bill, II

Pub. Papers of President Ford 1007 (July 21, 1975)) and from the Federal Energy Administrator's assurance in a press conference to the same effect in connection with the thrity-nine month phase-out proposal. (Appendix I of Petition, pp. 312a *et seq.*). Such assurances also included, and indeed required because of the length of the proposed phase-out, the President's agreement to an extension of the EPAA.

The phase-out amendments did not comply with the statutory requirements because:

(i) They were not proposals for "*exempting* such oil (crude) from such regulation," both because (a) the statute contemplated *full* exemption and the "amendment" was for gradual decontrol and (b) the statute contemplated that the deregulation would be of both price and allocation regulation, and the "amendment" "would not affect the crude oil allocation regulations," 40 Fed. Reg. 30,030, July 16, 1975. Indeed, the finding required by statute "that there is no shortage of such (crude) oil," and made by the FEA, would clearly appear to require both immediate total exemption, and that such be from allocation as well as price regulation. 40 Fed. Reg. 30.031, 31,742.

(ii) They were not proposals "for a period of not more than ninety days." One was for thirty months, and the other for thirty-nine months. The statute clearly contemplated limiting suspension of the regulations so as to require a fresh look at the underlying supply situation; the "amendments" did not so provide.

(iii) They were inconsistent with the statute under which they were promulgated in extending beyond the period of its authority, August 31, 1975. The thirty-month proposal would presumably become effective on or about July 23 after passage of

the legislative veto period (40 Fed. Reg. 30,030), while the thrity-nine month proposal would not be effective until Sept. 1 (40 Fed. Reg. 31,746), a day after the authority under which it was promulgated expired. Clearly the statutory authority was only to propose "amendments" which began and ended within the limit of the statute, August 31, 1975; neither did so, only the first being within the statutory expiration period at all and then only for a little more than one month of its thirty month duration.

2. *The President Agreed Retroactively To The Elimination Of The "Amendments" From The Regulatory Scheme.*

In his veto of a six month extension of the EPAA September 9, 1975 following rejection of his two phase-out "amendments" the president agreed to "accept a 45 day extension of price controls to provide time to work with Congressional leaders . . . (to) seek an acceptable compromise." Veto of a Bill to Extend Domestic Oil Price Controls II Public Papers of President Ford 1354 (September 9, 1975). What the President clearly contemplated, and what the extension he signed provided, was that "during the period of this extension . . . the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy under section 4(g)(2) . . ." 89 Stat. 481. That extension, signed by the President on September 29, was explicitly retroactive to August 31, and clearly represented an understanding by the President that his prior proposed "amendments" were to be considered null and void, from the date of their submission.

Moreover, the retroactive elimination of the effects of any such "amendments" was confirmed, if any confirmation was needed, by the President's approval of the EPCA on December 22, 1975. The development of a maximum weighted average first sale price of $7.66, the adjustments for inflation and as an incentive for production

(EPCA Section 401) and most explicitly the express elimination of total decontrol authority as to crude oil first sale (EPCA Section 455) all reflected a Presidential understanding that the "amendments" of July, 1975 were considered to be of no effect. (Appendix G of Petition, pp. 160a *et seq.*)

3. *No Effect Can Be Given To Phase-out Amendments Which Were Never Proposed To The Congress.*

Petitioners' argument that if the legislative veto provisions are severed effect must somehow be given to what the President would have proposed had he been unfettered by the threat of veto is of no merit for two simple reasons. First, there is no way to predict either what the President would have proposed, nor more importantly what Congress would have done in reaction to such proposals had they been made and not been subject to the legislative veto. Accordingly, there is no way to give effect to proposals not made and legislation not passed in response thereto.

Second, there is no legal basis for giving effect to regulations not proposed and petitioners were able to cite none. The case they cite, *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983) holds only that regulations *actually* promulgated should be stricken if improperly affected by the exercise of an unconstitutional veto. Similarly, in *Texas Medical Association v. Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), the Court was invalidating actually promulgated regulations because of undue Congressional pressure.

Indeed, the only possible application of the principle of those cases to the instant situation would provide an additional reason for the invalidation of the thirty and thirty-nine month crude oil phase-out amendments, to wit, that their submission rather than the more rapid

phase-out originally contemplated by the President was improperly influenced by the threat of a legislative veto and they should therefore be disregarded.

4. *Effectuation Of Crude Oil Decontrol At The President's Instance Could Not Have Been Accomplished Without Formal Congressional Action.*

It is significant that not only were the mandatory price regulations as promulgated by the President not subject to legislative veto, but indeed that the President had the right to amend such regulations to increase the price ceilings, without facing legislative veto, provided only that he did so in accordance with the statutory standards. *Consumers Union v. Sawhill,* 525 F.2d 1068 (Temp. Emer. Ct. App. 1975).

Inferentially, any proposed decontrol by the President, made or which might have been made, represented an acknowledgement that such was beyond the contemplation of the statute and was indeed not a regulatory proposal at all but rather a proposal for new legislation. As such, whether or not legislatively vetoed, it could not become law without formal legislative action, including concurrence of both houses of Congress, pursuant to Article I of the Constitution.

To give effect to a decontrol proposal without such Congressional concurrence would as much countenance an interference by the President with Congressional power, as did the Congressional action in *Chadha* represent an interference by Congress with the Presidential power.

IV.
CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certriorari be denied.

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FILED
NOV 8 1984
ALEXANDER L. STEVAS
CLERK

No. 84-188

In the Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the legislative veto provisions of the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA) (Pub. L. No. 93-159, 87 Stat. 629 *et seq.*), as originally enacted and as amended in 1975 by the Energy Policy and Conservation Act (Pub. L. No. 94-163, 89 Stat. 871 *et seq.*), were inseverable from the remainder of the EPAA, such that the entire price control program in effect under that Act between 1973 and 1981 was invalid.

2. Whether this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), should be applied retroactively to require the invalidation of the nationwide price control program under the EPAA and thereby to excuse petitioners from liability for conceded violations of the price control regulations.

3. Whether the House of Representatives' exercise of a legislative veto on two occasions in 1975 to disapprove two phased decontrol proposals by the President requires that those vetoed proposals now be given effect, even though the legislative vetoes were effectively ratified and superseded by two Acts of Congress and petitioners did not challenge the vetoes until seven years thereafter.

4. Whether petitioners may now challenge the price control program on the ground that the President was assertedly too cautious in proposing decontrol measures in 1975 and 1976 because of a concern that Congress might veto a particular decontrol proposal.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 744 F.2d 98. The opinion of the district court in *Dorchester Gas Producing Co.* v. *Department of Energy* (Pet. App. 41a-62a) is reported at 582 F. Supp. 927, and the opinion of the district court in *In re Department of Energy Stripper Well Exemption Litigation* (Pet. App. 63a-97a) is reported at 578 F. Supp. 586.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1984. The petition for a writ of certiorari was filed on August 2, 1984. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

STATEMENT

Petitioners contend that the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, which at one time imposed controls on the price of petroleum products, should be retroactively invalidated on the ground that it contained several legislative veto provisions that were unconstitutional under this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983).

A. The Statutory Program

1. During the summer of 1971, President Nixon invoked his authority under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, 12 U.S.C. (1976 ed.) 1904 note, to impose wage and price controls over most sectors of the American economy. The responsibility to enforce those controls was delegated to the Cost of Living Council. Exec. Order No. 11,615, 36 Fed. Reg. 15727 (1971). To combat rapidly rising prices of crude oil and refined oil products, the Cost of Living Council, on August 22, 1973, promulgated price control regulations applicable to the petroleum industry. 38 Fed. Reg. 22536, 23974 (1973).

By November 1973, petroleum shortages had greatly increased as a result of the Arab oil embargo. In response to this crisis, the President requested that Congress act promptly to pass pending emergency energy bills, including provisions that "would grant the President additional authority to allocate and ration energy supplies." 9 Weekly Comp. Pres. Doc. 1319, 1321 (Nov. 8, 1973).

Congress responded immediately. On November 27, 1973, the President signed into law the Emer-

gency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* The EPAA directed the President to promulgate regulations within 15 days mandating price and allocation controls on petroleum and petroleum products, to remain in effect through February 28, 1975 (§ 4(a), 15 U.S.C. 753(a); § 4(g)(1), 15 U.S.C. (Supp. IV 1974) 753(g)(1)). See Pet. App. 17a-18a. In Section 4(g)(2) of the EPAA, Congress authorized the President to amend the regulations to exempt crude oil, residual fuel oil, or a refined petroleum product from price and allocation controls for a period of not more than 90 days if he determined that (i) application of controls to the type of oil or product involved was unnecessary to accomplish the purposes of the Act, (ii) there was no shortage of the oil or product, and (iii) the exemption would not have an adverse impact on the supply of other oil or products. Any such decontrol determination was made subject to veto by either House of Congress (15 U.S.C. (Supp. IV 1974) 753(g)(2)).

2. As the February 28, 1975 expiration date of the EPAA approached, Congress extended the mandatory allocation and price controls of the EPAA for an additional six months, through August 31, 1975 (Pub. L. No. 93-511, 88 Stat. 1608). By the summer of 1975, however, the appropriate duration of controls on crude oil beyond that date had become a subject of political disagreement between President Ford and Congress. On July 16, 1975, pursuant to Section 4(g)(2) of the EPAA, the President submitted to Congress a plan for the decontrol of crude oil prices over a 30-month period (40 Fed. Reg. 30030, 30035-30036 (1975)), but that plan was disapproved by the House of Representatives on July 22, 1975. 121 Cong. Rec. 23983 (1975). A subsequent plan to phase out controls over a 39-month period

was submitted on July 29, 1975 (40 Fed. Reg. 31741), but that plan also was promptly disapproved by the House of Representatives (121 Cong. Rec. 25881-25882 (1975)).

These two decontrol plans proposed by President Ford were salvos in the broader give-and-take between the President and Congress in working toward a compromise regarding the extension of price controls beyond the August 31, 1975 expiration date of the EPAA. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1390-1393 (1977). Congress for a number of months had been considering bills to address that question,[1] and many Members of the House opposed the President's decontrol plans on the ground that the normal legislative process for the consideration of the pending bills was a preferable way to address the problem.[2]

Moreover, on July 21, 1975—the day before the House of Representatives disapproved the first of the President's proposals—the President had vetoed a bill (H.R. 4035, 94th Cong., 1st Sess.) that would have extended the EPAA to December 31, 1975, established a maximum price for domestic crude oil, and altered the provisions for congressional review of decontrol plans submitted to Congress under Section 4(g)(2) of the EPAA. See H.R. Conf. Rep.

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[1] S. 622, 94th Cong., 1st Sess. (1975); H.R. 7014, 94th Cong., 1st Sess. (1975). The former bill ultimately was enacted as the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 *et seq.* See page 6, *infra*.

[2] See, *e.g.*, 121 Cong. Rec. 23961 (1975) (remarks of Rep. Wirth); *id.* at 23962-23963 (remarks of Rep. Anderson); *id.* at 23972 (remarks of Rep. Dingell); *id.* at 23976-23977 (remarks of Rep. Heinz); *id.* at 23979 (remarks of Rep. Moss and Rep. O'Neill); *id.* at 25874 (remarks of Rep. Staggers).

94-356, 94th Cong., 1st Sess. (1975). The President stated in his veto message that if the alternative plan he had proposed for phased decontrol was not disapproved by Congress, he would accept a simple extension of the price and allocation provisions of the EPAA, but that if Congress did not accept his plan, he would have no choice but to veto even a simple six-month extension of the EPAA (121 Cong. Rec. 23959-23960 (1975)).[3] However, as petitioners concede (Pet. 27-28), even the Administration recognized that if one of the decontrol plans had not been disapproved by either House and if Congress in turn had simply extended the EPAA, Section 4(g)(2) of the EPAA would have required the President to resubmit his 30 or 39-month decontrol proposal to Congress every 90 days.[4]

Subsequently, Congress enacted a law to extend the EPAA temporarily to November 15, 1975, in order "to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy" (Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, § 4, 89 Stat. 481). The temporary extension act expressed the intent of Congress that the "status quo shall be maintained" and that the President should not institute any major change in petro-

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[3] The President subsequently did veto a bill (S. 1849, 94th Cong., 1st Sess. (1975)) providing for a simple six-month extension of the EPAA, explaining that he would accept only a 45-day extension (121 Cong. Rec. 28199 (1975)). His veto was sustained by the Senate (*id.* at 28489), and Congress then passed and the President signed the shorter extension discussed in the text, page 5, *infra*.

[4] See 121 Cong. Rec. 23960, 23961, 23962, 23963, 25872 (1975) (remarks of Rep. Anderson); *id.* at 23963 (remarks of Rep. Eckhardt).

leum pricing policy under Section 4(g)(2) of the EPAA prior to November 1, 1975. When Congress was unable to meet the November 15 deadline, it again briefly extended the EPAA to December 15, 1975 (Pub. L. No. 94-133, 89 Stat. 694).

3. Ultimately, in December 1975, Congress passed and the President signed the Energy Policy and Conservation Act of 1975 (EPCA), which embodied a compromise solution to the long-term petroleum pricing controversy (Pub. L. No. 94-163, 89 Stat. 871 *et seq.*). In the EPCA, Congress extended the mandatory allocation and pricing provisions in Section 4(a) of the EPAA for an additional 40 months and granted the President discretionary authority to retain controls after that date to September 30, 1981 (§ 461, 89 Stat. 955).

The amendments made to the EPAA by the EPCA authorized the President to adjust the ceiling price for crude oil, even during the period of mandatory controls, to take into account inflation and to provide production incentives for development of high-cost, high-risk properties (§ 8(d), 15 U.S.C. 757(d)). However, any actions to increase crude oil prices in excess of a 3% limitation on incentive adjustments or to increase prices beyond an overall 10% limitation for combined inflation and incentive adjustments were subject to a one-House legislative veto (15 U.S.C. 757(e)). In addition, the President was permitted, subject to a legislative veto, to lift controls for a particular product (other than crude oil) by converting the controls to a stand-by status (15 U.S.C. 757(e)). This provision essentially replaced the prior Section 4(g)(2) of the EPAA, which was repealed by Section 401(b)(1) of the EPCA, 89 Stat. 946.

4. None of the legislative veto provisions contained in the EPCA amendments was ever exercised. President Carter instituted phased decontrol effective Jan-

uary 1980 (44 Fed. Reg. 66186 (1979)), and President Reagan ended all controls on January 28, 1981 (Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981)). The EPAA, as amended, expired on September 30, 1981, but Congress specified that the expiration of control authority "shall not affect * * * any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date." § 18, 15 U.S.C. 760g.

B. The Proceedings in These Consolidated Cases

1. The judgment of the Temporary Emergency Court of Appeals (TECA) that petitioners ask this Court to review was rendered in two consolidated cases:

a. Stripper Well Proceedings

The first of the consolidated cases involves a challenge to the validity of an administrative ruling that interpreted a statutory and regulatory exemption from price controls for so-called "stripper wells," which are properties with an average daily production per well of not more than 10 barrels of crude oil. The ruling, first issued in December 1974, provided that injection wells (wells used to inject liquid into the reservoir to increase underground pressure) could not be counted in determining whether the exemption applies.

After Congress reenacted the statutory exemption in 1976, a number of suits were filed against the Federal Energy Administration (FEA) to challenge the exclusion of injection wells from the exemption. These suits were consolidated in the United States District Court for the District of Kansas. In June 1977, the district court, as a condition to granting

the industry plaintiffs an injunction against enforcement of the stripper well regulation as interpreted by the challenged ruling, required the plaintiffs to pay into an escrow fund the overcharges resulting from the inclusion of the injection wells. (Pet. App. 94a-97a). After several rulings on related matters, the TECA, in a decision dated July 29, 1982, sustained the Department of Energy's interpretation of the exemption. *In re Department of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982). The TECA accordingly reversed the district court's contrary holding and remanded with directions to enter judgment for the government (*id.* at 1392). This Court denied certiorari. 459 U.S. 1127 (1983).

Pursuant to the TECA's mandate, the district court on remand entered judgment against the industry plaintiffs on February 14, 1983, stating that "[t]he issue of the validity of the regulations and Rulings was finally settled" and that "[t]he effect of TECA's decision is to declare the funds deposited in escrow to be overcharges received due to violations of the petroleum pricing regulations." *In re Department of Energy Stripper Well Exemption Litigation*, 4 Energy Mgmt. (CCH) ¶ 26,445, at 29,305 (D. Kan. Sept. 13, 1983). On September 13, 1983, the district court referred to the Department of Energy the issue of the proper disposition of the overcharges. *Ibid.*

On November 14, 1983, plaintiffs filed motions for reconsideration. They contended for the first time that the statutory provisions for mandatory price controls were invalid ab initio and in their entirety because they contained legislative veto provisions that, in plaintiffs' view, were inseverable from the remainder of the EPAA. The district court certi-

fied this issue to the TECA by order dated January 27, 1984 (Pet. App. 10a-11a).

b. *NGL Proceedings*

In 1975, petitioner Exxon Corporation filed a declaratory judgment action in the United States District Court for the Northern District of Texas challenging the substantive and procedural validity of the FEA's regulations governing the pricing of natural gas liquids. In June 1983, the district court granted summary judgment in favor of the government on all issues except one. In September 1983, petitioner Exxon then moved to amend its complaint in order to challenge the validity of the EPAA and EPCA on the ground that they contained legislative veto provisions that Exxon contended were inseverable from the remainder of those Acts. Over the government's objection, the court permitted the filing of the amended complaint and certified the question presented to the TECA on the same day on which it entered a final judgment on the merits (Pet. App. 9a).

2. The TECA rejected petitioners' claim that the presence of legislative veto provisions in the EPAA and EPCA rendered those statutes void (Pet. App. 1a-40a). Applying the three-part test for retroactivity established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and applied in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982), the court first held that this Court's ruling in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), should not be applied retroactively to invalidate the EPAA and EPCA or the regulations promulgated thereunder (Pet. App. 30a-35a).

Alternatively, the TECA found that the legislative veto sections at issue were severable from the remainder of the EPAA and EPCA (Pet. App. 36a). In so

holding, the TECA followed its recent decision to the same effect in *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), cert. denied, No. 84-20 (Oct. 1, 1984). In its opinion in *Dyke* (Pet. App. 98a-135a), the TECA concluded that the one-House veto provisions were severable because the legislative history of the EPAA and EPCA showed that Congress had determined that there was a national crisis caused by the oil shortage and that Congress would not have insisted on inclusion of a legislative veto provision if doing so would have resulted in no price control legislation at all (Pet. App. 105a-111a). The TECA also rejected petitioners' argument that the regulations issued under the EPAA and EPCA were tainted and therefore invalid because they were promulgated while the statutory legislative veto provisions were in effect (Pet. App. 37a-39a).

ARGUMENT

The decision of the court of appeals, declining at this late date to invalidate the entire price control structure erected under the EPAA because of the presence of legislative veto provisions in the EPAA and EPCA, is clearly correct and does not conflict with any decision of this Court or another court of appeals. Petitioners' position hinges entirely on the premise that Congress would have refrained altogether from imposing any price controls in the period following the Arab oil embargo if it could not retain the authority to exercise a legislative veto over the President's lifting of those controls in certain specified circumstances. This premise is directly contrary to the entire thrust of the EPAA and EPCA to *mandate* price controls. Application of the ruling in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), to invalidate the now-expired price control program

also would be inconsistent with this Court's decisions on retroactivity.

In any event, these questions have been thoroughly considered by the TECA, which is the special court established by Congress to adjudicate controversies arising under the price control program and which accordingly has acquired a special understanding of that program and its authorizing statutes (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)). Moreover, the price controls were lifted almost four years ago, in January 1981, and the statutory authority to impose controls expired on September 30, 1981. As a result, this case involves no question of the authority of the Executive to continue to exercise regulatory authority under a statute containing legislative veto provisions. Further review therefore is plainly unwarranted.

1. As an initial matter, it is essential to recognize several critical distinctions between this case and *Chadha* that cast substantial doubt on petitioners' entitlement to challenge the price control program on the basis of the legislative veto provisions in the EPAA and the EPCA amendments thereto. In *Chadha*, the House of Representatives had actually exercised a legislative veto over the Attorney General's order suspending the deportation of the alien (*INS* v. *Chadha*, slip op. 6-7). The alien therefore could point to a concrete injury—the order requiring his deportation—that resulted directly from a violation of the bicameralism and presentment requirements in Article I of the Constitution, and the alien immediately brought an action to challenge the deportation order on constitutional grounds. In this case, by contrast, petitioners can point to no such direct injury resulting from the unconstitutional ex-

ercise of a legislative veto, and petitioners wholly failed to raise their challenge in a timely fashion.

a. The only two occasions on which either House of Congress exercised the legislative veto authority were in July 1975, when the President submitted plans under the original Section 4(g)(2) of the EPAA for the phased decontrol of petroleum prices over a 30 or 39-month period. See pages 3-4, *supra*. Those plans, as the TECA noted, exceeded the 90-day limitation on exemptions under Section 4(g)(2) and would have extended beyond the then-imminent expiration of the EPAA on August 31, 1975 (Pet. App. 39a). As Congress and President Ford both recognized, and as petitioners concede (Pet. 28), even if neither House had vetoed the President's plans, an extension of the EPAA would have been required in order to furnish statutory authorization for the price controls during the period that they were to be phased out. For this reason, the plans proposed by the President in July 1975 were not self-contained and self-executing programs for gradual decontrol of the prices of petroleum products; they were intimately bound up with the give and take between Congress and the President regarding the shape of the decontrol program that both acknowledged would have to be extended in some form by *statute* beyond August 31, 1975.

Against this background, petitioners' contention (Pet. 26-28) that the court below erred in not giving effect in the year 1984 to the two decontrol plans vetoed by the House of Representatives in 1975 is frivolous. Even if one of the plans had not been disapproved by the House, there can be no assurance that Congress would have permitted that plan to remain in effect when it enacted the necessary legislation to extend price controls beyond August 31, 1975. Moreover, the President's plans were never imple-

mented by the President following their disapproval, and the entire price control program continued past July 1975 on the premise that the vetoed plans were not in effect and that the prior controls instead were fully operative. Petitioners did not challenge the continuation of controls after July 1975 on the ground that the legislative vetoes were unconstitutional. Petitioners' efforts to do so now by interjecting that issue into these cases almost eight years later surely must be barred by laches. By the same token, the President's decision to respect the legislative vetoes and to retain the controls must now be accorded de facto validity. *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976).

Petitioners' belated challenge to the House's 1975 veto of the plans fails for another reason as well. After the House of Representatives rejected the President's proposals, Congress passed and the President signed a bill extending the EPAA from August 31, 1975 to November 15, 1975, in order to furnish Congress and the President more time to arrive at a long-term solution. This extension statute on its face expressed Congress's intent that the "status quo shall be maintained" (89 Stat. 481), and it thereby approved—by bicameral action presented to and approved by the President—the continuation of the price controls that were then in effect. Congress subsequently passed and the President signed the EPCA, which likewise was premised on the continuation of price controls, with termination provisions quite different from those proposed by the President. The House of Representatives' rejection of the decontrol plans in July 1975 thus was effectively ratified and superseded by these two laws. See, *e.g.*, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 300-301 (1937). For this reason, to the extent that petitioners were adversely af-

fected by the continuation of price controls after July 1975, that injury can no longer be attributed to the unconstitutional action by one House of Congress. See *United States* v. *Wyatt*, 680 F.2d 1082, 1087 (5th Cir. 1982).

Although the EPCA amendments to the EPAA also contained several legislative veto provisions, neither House of Congress actually exercised a veto over any Presidential actions under those amendments. Thus, petitioners likewise cannot trace any injury resulting from the continuation of price controls after the enactment of the EPCA in December 1975 to an actual violation of the bicameralism and presentment requirements. Compare *Muller Optical Co.* v. *EEOC*, No. 83-5889 (6th Cir. Sept. 4, 1984), slip op. 12-15.

b. Petitioners nevertheless contend (Pet. 16-22) that they are entitled to a judgment invalidating the entire price control program because of the mere presence of the legislative veto sections in the EPAA and EPCA. However, because petitioners can claim no violation of their own constitutional rights or any injury traceable to those provisions, they do not appear to have standing to challenge them. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-14; *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 471-476 (1982).[5] Compare *INS* v. *Chadha*, slip op. 14-15. Petitioners seem to believe that it is sufficient for standing purposes that they were adversely af-

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[5] See *United States* v. *Sutton*, 585 F. Supp. 1478, 1480-1481 (N.D. Okla. 1984); *United States* v. *Exxon Corp.*, 4 Energy Mgmt. (CCH) ¶ 26,447 (D.D.C. Aug. 29, 1983), appeal docketed, No. DC-93 (Temp. Emer. Ct. App.); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Corp.*, 420 F. Supp. 162, 170 (S.D. Ala. 1976), remanded, 578 F.2d 1149 (5th Cir. 1978), appeal dismissed on other grounds, 591 F.2d 711 (Temp. Emer. Ct. App.), cert. denied, 444 U.S. 879 (1979).

fected by the price controls imposed under the EPAA, because, in their view, Congress would not have enacted the EPAA or extended it in the EPCA without the legislative veto provisions. Insofar as we are aware, however, this Court has never held that a plaintiff is entitled to a judgment voiding an Act of Congress in its entirety on the ground that Congress would not have enacted the law if it had known that a particular provision that has no effect on the plaintiff would subsequently be held unconstitutional.[6]

2. In any event, the TECA was clearly correct in holding that the presence of the legislative veto provisions did not require invalidation of the EPAA and the massive price control program established under it. This Court has instructed that "[t]he cardinal principle of statutory construction is to save and not to destroy." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones*

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[6] The TECA in the instant case essentially followed its prior ruling in *Gulf Oil Corp.* v. *Dyke, supra*, with regard to standing (Pet. App. 29a-30a). In *Dyke*, the TECA concluded that Gulf Oil, which had appealed a final judgment of a district court that it had violated the EPAA, had standing to challenge the constitutionality and severability of the legislative veto provisions because, in the TECA's view, those questions had a bearing on its subject matter jurisdiction to entertain the appeal pursuant to Section 211 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note (Pet. App. 136a-140a), as incorporated by Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1) (Pet. App. 152a). See Pet. App. 105a & n.23. We disagree. Under paragraphs (c) and (g) of Section 211 of the ESA, the TECA is expressly granted jurisdiction to decide questions concerning the constitutionality of the EPAA. A holding that the Act is unconstitutional therefore does not affect the TECA's subject matter jurisdiction to decide that very question. Put another way, even if the unconstitutional legislative veto provisions are inseverable from the other substantive provisions of the EPAA, they clearly are severable from its jurisdictional provisions.

& Laughlin Steel Corp., 301 U.S. 1, 30 (1937). Accordingly, an unconstitutional portion of a statute is to be severed from the remainder "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS* v. *Chadha*, slip op. 10, quoting *Buckley* v. *Valeo*, 424 U.S. at 108, and *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). In addition, any invalid provision is "presumed severable if what remains after severance 'is fully operative as a law' " (*INS* v. *Chadha*, slip op. 13). See *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 10-11. That is precisely the legal test used by the lower court in *Gulf Oil Corp.* v. *Dyke* (Pet. App. 107a), which was followed by the panel in this case (Pet. App. 36a).[7]

The TECA also correctly applied that test in the circumstances of this case. First, the EPAA indisputably would have been "fully operative as a law" if its legislative veto provisions were severed for the period during which price controls remained in effect. The statutorily mandated price and allocation controls of course could have remained in force for that period, along with the Presidential decontrol au-

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[7] In light of this Court's repeated and explicit directions to consider whether the provisions that Congress actually and validly enacted are severable from those that are unconstitutional, petitioners' contention (Pet. 16-17) that the court of appeals should have considered whether Congress might have enacted some *other* version of a price control statute is without merit. Since petitioners do not identify any obvious alternative that Congress would have enacted, their suggested approach would entail endless speculation concerning possible alternatives and their relative feasibility and acceptability. Neither *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 60 (1922), nor *Consumers Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983), relied upon by petitioners (Pet. 17), supports such a requirement.

thorities. Without the provisions for a one-House veto, the decontrol provisions would have operated like the "report and wait" procedure involved in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). "Such a procedure is not only workable, but preserves to the greatest extent possible the compromise between Congress and the Executive intended in the legislation" (*Gulf Oil Co.* v. *Dyke* (Pet. App. 109a-111a & n.26)). See *INS* v. *Chadha*, slip op. 13-14 & nn.8, 9.

Second, this is by no means a case in which "it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not" (*INS* v. *Chadha*, slip op. 10). To the contrary, Congress enacted the EPAA as emergency legislation in 1973 in the wake of the Arab oil embargo. It is virtually inconceivable that Congress would have failed to enact the urgently needed controls if it could not retain the authority under Section 4(g)(2) to exercise a one-House veto over limited 90-day exemptions that could be granted only where the President had determined that controls were *not* needed. Indeed, if Congress had known that the legislative veto device was unconstitutional, it is far more likely that its response would have been to eliminate *any* authority for the President to establish an exemption or to curtail more sharply the scope of that authority.

Petitioners seek to avoid this obvious conclusion by arguing (Pet. 18-19) that because President Nixon was opposed to mandatory controls, the "political stalemate" would not have been broken without the provision permitting the President to exempt a product from controls for up to 90 days, which in turn was acceptable to Congress only when coupled with a legislative veto. But again this argument ignores the emergency climate in which Congress acted.

As petitioners concede (Pet. 17-18), the separate versions of the EPAA that passed the House and the Senate did not contain a provision for exemptions by the President, and yet each passed by a margin well in excess of that required to override a Presidential veto. 119 Cong. Rec. 18064, 34477 (1973).[8] For this reason, the premise of petitioners' argument—that President Nixon successfully could have resisted the imposition of mandatory controls in the absence of a provision for Presidential exemption—is speculative at best.

Just as important, President Nixon did not oppose mandatory controls by the time the EPAA was enacted. The materials petitioners cite (Pet. 17-18) show only that the President wanted some provision for removing controls at a later date, not that he was opposed to their imposition at the outset. Moreover, the President's opposition was principally to allocation controls, since he already had imposed price controls on petroleum products under the Economic Stabilization Act (ESA). See page 2, *supra*. And even as to allocation controls, although President Nixon initially preferred a voluntary approach (see

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[8] Petitioners rely (Pet. 18-19) on a statement by Representative Staggers describing the decontrol/legislative veto provision in Section 4(g) of the EPAA as one of the "significant matters agreed to in conference." Their focus on this statement is misleading, however, because Representative Staggers summarized his remarks by noting that the conference bill "depart[ed] in only minor ways from the [initial] House-passed bill," which contained no legislative veto provisions. 119 Cong. Rec. 36866 (1973). He described the provision for limited exemptions as intended to permit the President some flexibility in implementing the control program. There is no indication that Section 4(g)(2) was intended to permit wholesale "decontrol," as petitioners imply (see Pet. 18-19).

Pet. 17-18), he later recognized that "a mandatory allocation system [was] necessary" and issued mandatory allocation regulations for certain products under the ESA in October 1973. 9 Weekly Comp. Pres. Doc. 1213 (Oct. 2, 1973). Furthermore, after the Arab oil embargo, President Nixon requested that Congress act promptly in passing the various pending emergency energy bills, specifically including authority to allocate petroleum products.[9]

For similar reasons, petitioners also err in contending (Pet. 19-21) that the legislative veto provisions in the EPCA amendments to the EPAA were inseverable. As petitioners concede (Pet. 19-20), Congress was as intent on having price controls in 1975 as it was in 1973. It therefore is clear that if Congress had known that the legislative veto device was unconstitutional, it would not have chosen to end all price controls abruptly in the fall of 1975 by allowing the EPAA to expire. Even the President's proposals that were disapproved by the House of Representatives in July 1975 did not call for immediate and total decontrol in that manner. They would have provided for a phased decontrol over 30 or 39 months, periods that were not far short of the 40-month extension of mandatory controls subsequently enacted

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[9] 9 Weekly Comp. Pres. Doc. 1319 (Nov. 8, 1973). The letter cited by petitioners (Pet. 18) from John Love, Assistant to the President, to Representative Staggers was written prior to this announcement. Moreover, the letter nowhere suggested inclusion of a Presidential decontrol provision. Rather, the Administration's criticism of the House bill was directed to a rigid allocation formula based on historical use and the lack of flexibility in determining whether to impose controls on the allocation of the production of oil. 119 Cong. Rec. 34312-34313 (1973). Congress acted to alleviate those concerns. See H.R. Rep. 93-628, 93d Cong., 1st Sess. 12, 22 (1973).

in the EPCA. There accordingly is no reason to believe that any new legislative veto provisions in the EPCA were critical to enable the President and Congress to reach an agreement on the basic question of the extension of mandatory controls.[10]

In fact, during the 40-month period of mandatory controls for crude oil adopted in the EPCA, Congress granted the President authority to permit annual incentive adjustments of up to 3% and combined adjustments for incentives and inflation of 10% without a legislative veto and to permit greater increases for crude oil subject to a legislative veto. 15 U.S.C. 757(d) and (e).[11] Congress thus perceived no inconsistency between extending mandatory controls and at the same time allowing the President to increase the allowable price in specified circumstances. It therefore is wholly unreasonable to believe, as petitioners urge (Pet. 20-22), that Congress would have intended a court to strike down the entire EPAA price control program if it invalidated the statutory provisions permitting a legislative veto of certain limited price increases by the President. That result would have removed crude oil prices even from Presidential control and would have allowed price increases whether or not they were tied to inflation

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[10] Contrary to petitioners' contention (Pet. 20), the Senate did not "specifically vote[]" in the spring of 1975 to retain the legislative veto power. The floor amendment involved did not even refer to a legislative veto, and the passing reference to the veto power was part of Senator Jackson's statement in opposition to the amendment. 121 Cong. Rec. 9857 (1975).

[11] Congress also authorized the President, subject to a legislative veto, to convert controls to a standby status for products other than crude oil. 15 U.S.C. 760a.

or the need for production incentives, as required by 15 U.S.C. 757.[12]

3. a. Even if the legislative veto provisions of the EPAA were not severable from the remainder of the statute, petitioners still could not prevail unless this Court's decision in *Chadha* were to apply retroactively. The TECA was clearly correct in its alternative holding (Pet. App. 30a-35a) that *Chadha* should not be applied to invalidate the system of price controls established under the EPAA. All three of the relevant considerations this Court has identified weigh heavily against retroactive application. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Brennan, J.), quoting *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

First, the Court in *Chadha* decided "an issue of first impression whose resolution was not clearly fore-

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[12] Petitioners' reliance (Pet. 21) on the absence of an explicit severability clause in the EPAA is also misplaced. First, as the court below recognized in *Gulf Oil Corp.* v. *Dyke*, *supra* (Pet. App. 106a n.24), the express incorporation of Section 211 of the ESA into the EPAA strongly implies that Congress intended severability. Section 211(g) vests the TECA and this Court with exclusive authority to "determine the constitutional validity of *any provision* of this title" and to invalidate the statute *"in whole or in part."* 12 U.S.C. (1976 ed.) 1904 note (emphasis added).

Second, petitioners' assertion that the lack of an explicit severability clause creates a presumption of inseverability is contrary to this Court's statement in *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968), which was quoted and relied upon by the court below in *Gulf Oil Corp.* v. *Dyke* (Pet. App. 107a), that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." See also *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984); *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983).

shadowed" by earlier cases (*Northern Pipeline*, 458 U.S. at 88). Before *Chadha*, this Court had never addressed the issue; only Justice White had expressed a view on the validity of the legislative veto device, and he would have sustained it. See *Buckley* v. *Valeo*, 424 U.S. at 284 (White, J., concurring and dissenting). The initial court of appeals' opinion on the subject was *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977) (en banc), cert. denied, 434 U.S. 1009 (1978), which likewise sustained the constitutionality of a legislative veto provision. The first conflicting decision by a court of appeals was that of the Ninth Circuit in *Chadha* v. *INS*, 634 F.2d 408, which was rendered in December 1980—well after Congress had enacted the EPAA and EPCA and only a month before President Reagan lifted all controls under the EPAA in January 1981. Thus, when the price controls were in effect, this Court's decision in *INS* v. *Chadha* was not clearly foreshadowed.[13] Indeed, the fact that petitioners did not attempt to interject the legislative veto issue into these cases until after this Court rendered its decision in *Chadha* in 1983—long after they had filed suit beginning in 1975—substantially undermines the credibility of their current assertion that the holding in *Chadha* was so preordained as to compel retroactive application.

Second, retroactive application of *Chadha* in this case plainly is not necessary to further the operation

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[13] Contrary to petitioners' assertion (Pet. 13), this conclusion is not undermined by the fact that successive Presidents had questioned the constitutionality of the legislative veto. In *Marathon*, the Court declined to give retroactive effect to its holding even though Members of Congress had expressed serious reservations about the constitutionality of the jurisdictional provisions of the Bankruptcy Act of 1978. See 458 U.S. at 61 n.12, 88 (opinion of Brennan, J.).

of that decision (*Northern Pipeline*, 458 U.S. at 88). The essential holding in *Chadha* was that "action of one House of Congress * * * violates strictures of the Constitution" (slip op. 23). Here, however, there was no "action of one House of Congress" under the EPCA, since neither House ever exercised a legislative veto under that Act. And, although the House of Representatives did disapprove two proposed decontrol plans in July 1975 under the EPAA as originally enacted, those disapprovals were effectively ratified and superseded by Acts of Congress, including the EPCA. Retroactive application of *Chadha* therefore is not necessary in this case to remedy any injury resulting from an actual violation of the bicameralism and presentment requirements of the Constitution. Nor is application of *Chadha* necessary here to prevent future exercises of the veto or even to prevent the continuation of price controls free of the check of a legislative veto mechanism, because the EPAA expired in September 1981.

Third, retroactive application of *Chadha* in the circumstances of this case clearly would produce "substantial inequitable results" (*Northern Pipeline*, 458 U.S. at 88). If the decision were made fully retroactive, the result would be to permit the challenging of millions of completed transactions and numerous final judgments and settlements. There is a compelling public interest in avoiding such disruption. Petitioners seek to avoid that result by contending (Pet. 15) that a retroactive application of *Chadha* in this setting could be limited to pending proceedings and to future actions that are timely brought. But that approach would only intensify the inequities. Those parties who, like petitioners herein, fortuitously happen still to be involved in litigation arising under the price control program or who would not be time-

barred under state law from bringing an action in the future would be permitted to avoid price controls altogether for the relevant period, a wholly unjustified windfall for those who had violated the regulations under which the rest of the Nation operated.

b. Petitioners also err in contending (Pet. 10-11) that this Court's summary affirmances in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982), aff'd, No. 82-935 (July 6, 1983), and *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983), require retroactive application of *Chadha* in the circumstances of this case. The retroactivity question was not even raised in the *FTC* and *FERC* cases. Moreover, the court of appeals in those cases had held the challenged legislative veto provisions unconstitutional before this Court rendered its decision in *Chadha*. The affirmance of those decisions on direct appeal therefore did not require a "retroactive" application of *Chadha*, and it would have been unfair to the plaintiffs to deprive them of the benefit of a favorable appellate decision that fully accorded with the subsequent holding by this Court in *Chadha* merely because this Court had not yet spoken at the time the court of appeals rendered its decision.

Furthermore, in both the *FERC* and *FTC* cases, unlike in the instant case, a legislative veto had actually been exercised and had not been ratified by a subsequent law. Accordingly, this Court's affirmance of the court of appeals' decisions served to remedy actual constitutional violations, just as in *Chadha* itself. Finally, in the *FERC* and *FTC* cases, the parties claiming to have been injured by the veto immediately brought suit to challenge it. In this case, by contrast, petitioners delayed for a number of years before challenging the price control program on legis-

lative veto grounds. In the intervening period, there had been pervasive reliance throughout the Nation on that program as it had been implemented. See Pet. App. 34a-35a.[14]

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[14] Petitioners mistakenly rely (Pet. 11-12) on six district court decisions that they contend support the retroactive application of *Chadha* here. The first of the decisions, *Alaska Airlines, Inc.* v. *Donovan*, No. 84-485 (D.D.C. May 18, 1984), appeal pending, No. 84-5467 (D.C. Cir. filed July 26, 1984), involved a challenge to regulations promulgated after *Chadha*, pursuant to a statute that contained a legislative veto provision. There was no question regarding the retroactive application of *Chadha* to invalidate prior Executive action, as in this case.

Three more of the cases petitioners cite involved challenges to the EEOC's enforcement of the Equal Pay Act and the Age Discrimination in Employment Act on the ground that the Reorganization Plan transferring enforcement authority from the Secretary of Labor to the EEOC was invalid because the Reorganization Act contained an assertedly inseverable legislative veto provision. See also *EEOC* v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), petition for reh'g pending. Congress since has passed a law ratifying all past Reorganization Plans (Pub. L. No. 98-532, 98 Stat. 2075), thereby mooting the issue in the cases upon which petitioners rely and suggesting that past Executive actions that were not vetoed should not be set aside in the wake of *Chadha*. We note as well that before Congress acted, the vast majority of lower court decisions had sustained the enforcement authority of the EEOC, notwithstanding the presence of the legislative veto provision in the Reorganization Act. See cases cited in Reply Br. for Appellant 4 n.2, *EEOC* v. *Allstate Insurance Co.*, appeal dismissed, No. 83-1021 (June 11, 1984), and J.S. at 6-7 n.2, *EEOC* v. *Martin Industries, Inc.*, appeal dismissed, No. 88-1893 (Oct. 1, 1984). See, *e.g.*, *Muller Optical Co.* v. *EEOC*, *supra*; *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

In *Allen* v. *Carmen*, 578 F. Supp. 951 (D.D.C. 1983), there had been repeated exercises of the legislative veto to invalidate the regulations implementing the Presidential Recordings and Materials Preservation Act (44 U.S.C. 2107 note), and the

4. Petitioners' final contention (Pet. 22-26)—that the President was deterred in 1975 and 1976 from proposing certain decontrol measures because of the possibility that one House of Congress might disapprove them—is even less worthy of review. Petitioners apparently would have the courts below substitute for the controls that the President actually implemented some other set of controls that the President *might* have promulgated if he had been free of the possibility of a legislative veto. Petitioners do not suggest what form the alternative set of controls might have taken, and it would be wholly speculative and unrealistic for a court to attempt at this late date to ascertain the President's supposed "intent" in this regard and to fashion its own set of hypothetical controls to approximate that intent.

Nor do the circumstances of this case remotely suggest the occasion for such an extraordinary judicial undertaking. Even if petitioners are correct (Pet. 23-24) that the President was initially dissuaded in early 1975 from submitting certain decontrol proposals to Congress, the fact remains that the

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court found that there would not be substantial inequitable results if *Chadha* were applied retroactively (578 F. Supp. at 966-968). Neither of those factors is present here. The final decision petitioners cite, *City of Alexandria* v. *United States*, 3 Cl. Ct. 667, 675-678 (1983), did not even involve a legislative veto provision, but the court nevertheless reasoned that a congressional committee had impermissibly intervened in Executive actions. There was no such interference here. Moreover, as petitioners concede (Pet. 11-12), the Claims Court's decision was subsequently reversed by the Federal Circuit, which found *Chadha* inapplicable and further found no constitutional violation on the facts presented. *United States* v. *City of Alexandria*, 737 F.2d 1022 (1984).

President subsequently did propose plans in July 1975 to phase out controls over 30 or 39 months. When Congress extended the EPAA in 1975 and effectively ratified the House of Representatives' disapprovals of those two plans, it also necessarily rendered moot any controversy regarding the legal viability of any plans that the President previously might have considered but did not even submit to Congress.

Petitioners' contention (Pet. 25) that the maintenance of controls after enactment of the EPCA in 1975 was fatally "tainted" by the fear of a legislative veto is equally flawed. President Carter stressed soon after assuming office that he was "committed to the retention of domestic oil price controls for the foreseeable future to prevent windfall profits for oil producers who would otherwise be able to charge the OPEC-determined world price of oil." 13 Weekly Comp. Pres. Doc. 573, 578 (Apr. 20, 1977). And after price controls became discretionary in April 1979, President Carter did not exercise his authority immediately to decontrol all crude oil and refined products, but implemented only a phased program of gradual decontrol. Petitioners' contention that the mere existence of the legislative veto provisions caused decontrol proposals to be "held hostage" also ignores the series of decontrol measures that in fact were implemented by the President. See 41 Fed. Reg. 13898 (1976) (residual fuel oil); *id.* at 24516 (middle distillates); *id.* at 30096 (general refinery products); *id.* at 40451 (naphtha jet fuel).

In any event, petitioners cannot be heard in 1984 to challenge what they contend (Pet. 25) was a too "cautious" approach to decontrol by the Executive under the EPCA beginning in 1976 on the basis of nothing more than a few passages in internal Execu-

tive Branch memoranda reflecting a concern about possible congressional or public reaction—a concern that might have equally influenced the President even in the absence of a formal legislative veto mechanism. As with other aspects of petitioners' submission in this Court, their failure to perceive this supposed "taint" in the administration of the price control program at any earlier date itself indicates that there was no fundamental defect that should now cast doubt on the validity of that expired program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10082

Office-Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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IN THE

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ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF

This case poses several important issues arising in the wake of *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). These relate to (1) the retroactive applicability of *Chadha*, (2) the appropriate standard for determining whether one-house veto provisions are severable, (3) the enforceability of regulations whose substance and duration were shaped by the existence and use of the unconstitutional veto power, and (4) the effect to be given presidential orders that were unconstitutionally vetoed. The oppositions submitted by the Department of Energy (DOE Opp.) and the intervenor respondents (Int. Opp.) do not diminish the special and important reasons for review of these issues by this Court.

As a threshold matter, DOE urges that the petition should be denied because the Emergency Petroleum Allocation Act of 1973 (EPAA) and the Energy Policy and Conservation Act of 1975 (EPCA) have expired and the case therefore supposedly "involves no question of the authority of the Executive to continue to exercise regulatory authority under a statute containing legislative veto provi-

sions." DOE Opp. 11. This contention is patently wrong. DOE's authority to initiate and prosecute enforcement actions under the statutes survives, 15 U.S.C. § 760g (1982), and the agency is now pressing hundreds of such actions involving billions of dollars.[1] In the stripper well litigation alone, hundreds of millions of dollars are at stake. This case thus manifestly does involve the continuing exercise of regulatory authority under statutes containing veto provisions. More than that, the regulatory program sought to be enforced was shaped in large part by the presence and exercise of the veto power.[2]

1. *Supposed "Ratification" Of The Congressional Vetoes.* Congress twice vetoed presidential orders that would have phased out crude oil price controls. It is undisputed that by these vetoes Congress exceeded its constitutional powers. DOE now strains to make the vetoes vanish. It contends that the unconstitutional congressional vetoes were "effectively ratified" by subsequent extension of the EPAA and enactment of the EPCA and,

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[1] During oral argument in this case before the Temporary Emergency Court of Appeals (TECA) on May 10, 1984, counsel for DOE informed the court that over 550 enforcement cases are pending before the agency or in litigation.

[2] DOE suggests that the petitioners "failed to raise their challenge in a timely fashion." DOE Opp. 12. This suggestion is groundless. The district courts considered the *Chadha* issues to be timely raised and certified them to TECA. Pet. App. 56a-58a, 89a-90a. DOE did not allege laches before TECA, and no laches bar can be made out. The petitioners' argument under *Chadha* is in the nature of a defense against enforcement of the statutes, and laches does not "run against a defense." *Mobil Oil Corp. v. DOE*, 728 F.2d 1477, 1487 (TECA 1983), *cert. denied*, 104 S. Ct. 3545 (1984). Moreover, there was no inexcusable delay or prejudice, the elements essential to a laches defense. *Id.* at 1488; *see Allen v. Carmen*, 578 F. Supp. 951, 962-63 (D.D.C. 1983). In particular, the *Chadha* issues were raised soon after the district courts disposed of the principal regulatory and statutory issues in these cases; it was only then that it became appropriate to consider constitutional issues in any event.

accordingly, that no "actual violation" of the Constitution occurred. *E.g.*, DOE Opp. 13-14. This contention, which is central to DOE's argument on almost every question presented, *see* DOE Opp. 13-14, 22-23, 24, 27, has no basis in constitutional principle.

The immediate effect of the unconstitutional vetoes was to block the President's decontrol orders. Under the first of those orders, the price control program would have been phased out in 30 months. Such a phase-out would have materially reduced the amount of the overcharges now alleged against the petitioners. No case or doctrine supports DOE's contention that unconstitutional legislative action with such consequences can be placed beyond reach of judicial relief by subsequent "ratification." This Court has long recognized that "whatever the legislature could not have authorized originally it cannot confirm." *Turpin v. Lemon*, 187 U.S. 51, 57 (1902). Congress could not authorize itself to exercise a legislative veto and therefore was powerless to ratify that exercise. In arguing the contrary, DOE relies exclusively on *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937). That case, however, involved ratification by Congress of allegedly invalid *executive* action, on the familiar ground that Congress subsequently may "ratify . . . acts which it might have authorized." *Id.* at 301-02. Nothing in *Swayne* suggests that Congress could ratify its own prior legislative vetoes, for those vetoes were unconstitutional in the first instance.

DOE's novel ratification argument ultimately rests upon the theory that by signing the bills extending the EPAA and enacting the EPCA, President Ford approved the prior legislative vetoes that had blocked his decontrol orders. Those enactments, however, were neutral concerning the legislative vetoes and did not themselves purport to nullify the presidential decontrol orders. Certainly in such circumstances subsequent legislation cannot be

deemed to ratify or give validity to previous unconstitutional legislative acts. *See Town of South Ottawa v. Perkins*, 94 U.S. 260, 270 (1876). Moreover, President Ford's contemporaneous statements show that he had not changed his mind about phased decontrol but rather had been compelled to accept a continuation of controls as a result of congressional exercise of the veto power.[3]

DOE's theory affronts common sense by sanctioning congressional exploitation of the very procedure that this Court held unconstitutional in *Chadha*. In effect, DOE argues that if congressional vetoes thwart the President's will and force him to accept a bill that he otherwise would not have accepted, the resulting legislation cures the constitutional defect in the vetoes. But presidential acquiescence in action that infringes constitutional limits on the power of Congress does not shield the trespass from judicial review. Thus, in *Chadha*, this Court rejected the claim that a veto provision is "somehow immunized from constitutional scrutiny because the Act containing [it] was passed by Congress and approved by the President." 103 S. Ct. at 2779 n.13.[4] Here, equally, there is no merit in DOE's contention that actual legislative vetoes can somehow be immunized because the President signed subsequent legislation wrought by the force of the vetoes themselves.

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[3] President Ford's remarks upon signing the EPAA extension act and the EPCA reflect his frustration over the proven effectiveness of the veto provisions in thwarting his plans for phased decontrol and also his continuing intention nevertheless to seek to expedite the decontrol of crude oil. *See* II Pub. Papers of Pres. Ford 1538, 1992-93 (Sept. 29, Dec. 22, 1975).

[4] As the court noted in *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 465 n.166 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983): "The Supreme Court has never hesitated to find an unconstitutional encroachment on presidential authority simply because the President signed the statute at issue."

The failure of DOE's ratification defense vitiates much of its opposition. First, it is not contested that the vetoes violated the Constitution. Absent the supposed ratification, that constitutional violation must be remedied. At a minimum, the vetoed 30-month decontrol order must be given effect, just as effect was given to the vetoed suspension order in *Chadha*.[5]

Second, the actual vetoes were part and parcel of a broader pattern of threatened and potential uses of the unconstitutional veto power that fundamentally shaped the entire substance and the duration of the price control regulations. *See* Pet. 22-26. This unconstitutional taint is also beyond cure through supposed ratification and thus requires judicial correction. The petitioners do not, as DOE suggests, propose that this Court speculate as to what program the President would have promulgated in the absence of unconstitutional legislative coercion. *See* DOE Opp. 26. The proper remedy is to prohibit continued enforcement of the regulations. *See Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983).

Third, DOE's objection to petitioners' standing, DOE Opp. 14-15, is plainly erroneous because the vetoes indisputably had an impact on the petitioners.[6] Even if the vetoes could be ignored, the petitioners would have standing based on the veto provisions themselves. Standing requires only that the petitioners assert an "actual or threatened injury" that "can be traced" to the statutes at

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[5] DOE has abandoned its contention before TECA that the President's decontrol orders were invalid. The intervenor respondents do make that argument, *see* Int. Opp. 17-18, but it is without merit. *See* Pet. 27-28.

[6] Had it not been vetoed, the President's 30-month decontrol order would have allowed lower-tier crude oil, then subject to an average controlled price of $5.25, steadily to rise to the uncontrolled price, which averaged $12.25 in July 1975. *See* Pet. 26 n.25; Pet. App. 239a, 246a-47a. TECA properly upheld the petitioners' standing in view of this unquestioned injury. Pet. App. 30a.

issue and "redressed by a favorable decision." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). DOE's attempt to enforce the price regulations obviously constitutes "direct, pocketbook injury" traceable to the challenged statutes. *Barrows v. Jackson*, 346 U.S. 249, 256 (1953).[7] The injury is redressable because if the veto provisions are inseverable, DOE's enforcement actions against the petitioners, like the deportation order in *Chadha*, "will be cancelled." 103 S. Ct. at 2776.

2. *Retroactivity.* As noted in the petition, TECA's refusal to give retroactive effect to *Chadha* is inconsistent with the clear import of that decision, with this Court's summary affirmances in *Consumers Union* and *Consumer Energy Council*, and with the great weight of lower court authority. Pet. 11-12. Since the petition was filed, the Second Circuit has ruled that *Chadha* applies to previously-enacted statutes and has therefore invalidated the entire Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982), on the ground that it contained an inseverable legislative veto provision. *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), *petition for reh'g en banc filed* (Sept. 11, 1984).[8] There is thus a conflict among the courts of appeals on the issue of retroactivity presented here.

In defending the decision below, DOE misapplies the three-part test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As to the first factor, *Chadha* clearly was foreshadowed by a respectable body of opinion which

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[7] Contrary to DOE's suggestion, DOE Opp. 14-15, it makes no difference whether the injury is traceable to the invalid provision itself or to other sections of the statute. A party may challenge or defend against enforcement of a statutory provision on the ground that it is inseverable from an invalid provision of the same statute. *Dorchy v. Kansas*, 264 U.S. 286, 288-89 (1924).

[8] Although the Reorganization Act issue in *CBS* may have been mooted by recent legislation, *see* Pub. L. No. 98-532, 98 Stat. 2705 (1984), the conflict remains because the Second Circuit can be expected to continue to apply *Chadha* retroactively in other contexts.

supported the position ultimately taken by this Court. *See EEOC v. CBS, Inc.*, 743 F.2d at 972-73. Indeed, the government itself currently is arguing in other litigation that *Chadha* came as no great surprise.[9] In addressing the second factor—whether retroactive application would further or retard the operation of *Chadha*—DOE again resorts to the fiction that the unconstitutional action of Congress in this case was erased by effective ratification. DOE Opp. 23. Finally, with regard to considerations of equity, DOE errs in suggesting that retroactive application might undo completed transactions and final judgments. DOE Opp. 23. Retroactive application would be constrained by statutes of limitations and the doctrine of res judicata. Pet. 15. By contrast, substantial inequity would result from failing to apply *Chadha* in the present enforcement proceedings against the petitioners, who have already incurred enormous, unredressable injury because of prior application of these unconstitutional controls.

3. *Severability.* In its ruling on severability, TECA resolved a question of great importance under a patently erroneous legal standard. TECA found the legislative veto provisions severable because "the question is not whether Congress would have enacted these *exact* statutes had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (TECA 1984)

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[9] The government contends elsewhere that "[i]n 1978, when the [Airline] Deregulation Act was passed, Congress was fully aware of the serious doubts regarding the validity of the legislative veto, and it knew that the veto provision could be struck down at any time." *See* Appellant's Brief, dated October 15, 1984, at 27, *Alaska Airlines, Inc. v. Donovan*, No. 84-5442 (D.C. Cir.). The brief cites the long-standing position of the Executive Branch, the arguments of a number of legal scholars, and the split decision "narrowly" upholding the veto in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

(emphasis in original), *cert. denied*, 53 U.S.L.W. 3239 (U.S. Oct. 2, 1984) (followed by TECA in these proceedings, Pet. App. 36a). DOE endorses TECA's test, asserting that the court properly declined to consider "whether Congress might have enacted some *other* version of a price control statute," DOE Opp. 16 n.7 (emphasis in original), and that the petitioners cannot prevail unless it is found that "Congress would have refrained altogether from imposing any price controls." DOE Opp. 10.

The test adopted by TECA directly conflicts with this Court's consistent teaching for more than half a century that the entire statute must fall if "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Chadha*, 103 S. Ct. at 2774. Under that standard, inseverability does not require a judicial conclusion that no legislation would have been enacted. Challenged legislation must fall if Congress would have enacted *either* no statute at all *or* a different statute.

Thus, DOE entirely misses the point in asserting that it is "inconceivable" that Congress would have failed to enact some program of price controls. DOE Opp. 17.[10] The question is not whether there would have been *some* controls but whether there would have been the *same* controls.[11] The invalid legislative veto device enabled a par-

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[10] In view of the intense inter-Branch conflict over energy poilicy, *see* Pet. 17-22, a permanent stalemate would have been entirely conceivable had it been known that the legislative veto was not available as a ground of compromise. The President and Congress battled over the provisions of the EPCA for a year. Upon signing the EPCA, President Ford noted: "If I were to veto this bill, the debates of the past year would almost surely continue through the election year and beyond." II Pub. Papers of Pres. Ford 1993 (Dec. 22, 1975).

[11] DOE complains that the petitioners have not identified "any obvious alternative that Congress would have enacted." DOE Opp. 16 n.7. But precisely what would have happened is unknowable and need not be ascertained. There are several obvious possibilities. Perhaps there would have been no statute, perhaps inflexible controls would have been mandated for a shorter time, or perhaps higher prices would have been authorized.

ticular political compromise to be reached, under which the President obtained the authority to lift or relax controls while Congress was assured the final say. Had Congress known the legislative veto was unavailable, a different political result would have ensued. These particular statutes would not have been enacted. Pet. 17-22.[12]

DOE contends that the EPAA and the EPCA nevertheless should be saved on the ground that, after severance of the veto provisions, they could remain technically operative as "report and wait" laws. DOE Opp. 16-17. It is, however, irrelevant that the valid provisions might be technically operative unless Congress intended them to stand independently. *Lynch v. United States*, 292 U.S. 571, 586 (1934); *see Chadha*, 103 S. Ct. at 2774-75. Congress would not have enacted the EPAA and the EPCA as "report and wait" laws because Congress wanted to be able to "override" presidential initiatives, 119 Cong. Rec. 36,866 (1973) (Chairman Staggers), and the extremely short waiting periods (five days under the EPAA and fifteen days under the EPCA) would not have given Congress time to enact overriding legislation after a presidential "report." In sum, the legislative history in

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[12] The intervenor respondents argue that the legislative veto provisions are inseverable from the presidential decontrol authority and that both should be severed from the statutes, leaving only the mandatory control authority. Int. Opp. 7-13. But severance is never permissible where the valid provisions, standing alone as enacted, would "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). Here, Congress contemplated decontrol measures, and even though President Ford's crude oil decontrol measures were thwarted through the legislative veto device, other aspects of DOE's program eventually were shaped as much by the decontrol authority as by mandatory controls. By 1980, more than half, by volume, of all refined petroleum products had been decontrolled by Presidents Ford and Carter. *Cf.* DOE Opp. 27. Hence, severance of both the decontrol authority and the legislative veto provisions would create a regulatory program that bears scant resemblance to the one "actually adopted."

every respect shows unmistakably that Congress intended the statutes to stand or fall as a whole.[13]

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

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November 19, 1984

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[13] As shown in the petition, Congress deliberately omitted severability clauses from both the EPAA and the EPCA. Pet. 19 n.15, 21. DOE wrongly suggests, DOE Opp. 21 n.12, that the EPAA includes an "implicit" severability clause by incorporation of § 211(g) of the Economic Stabilization Act of 1970 (ESA), *as amended*. Pet. App. 139a-40a. Section 211(g) simply grants exclusive jurisdiction over EPAA cases, in a manner that is neutral on the question of severability. If Congress had sought to include a severability provision in the EPAA, it would have incorporated the ESA's distinct and explicit severability provision, § 220. *See* Pet. 19 n.15.